

Form of Reform
Judicial Reform in Egypt:
Lesson from the Developed Countries

By

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Abstract

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The reform is an ongoing process in any society. It is the sign of the development in different areas. It is not only the technology that is rapidly changing societies, but it also changes the societies, which use these technologies. With the rapid change in the structure of social and economical changes in the world, the question of the reform of social and economical institutions is also rapidly demanding. These institutions are varied. There are private and public institutions. Within the public sphere, the judicial system is comes on the top of institutions that require continuous reform than the two other braches of the government. They are facing the development with their political agenda that change every term (whether five or four years in office). On the other hand, it is hard to find a judicial system develop as fast as the development of the legal system or its politics. In Egypt, the judiciary did not witness any serious reform since 1949. During this period until the present day, the country witnesses several social and economical developments. Monarchy system, Socialist system, social-democratic system, capitalist system and Islamic system are political and social systems apply in Egypt in the last sixty years. In the past two decades, there was a great call and debate about the necessity of a new reform of the judiciary to face the rapid social and economical change in the country. This reform takes only one shape, which serves the economic development and the foreign investment.

On the other hand, the social reform was a secondary. After the 25th of January Revolution, the debates about reform reaches its uttermost. The main argument was whether to reform or to maintain the current form of the judiciary. In case of maintaining the call for a reform, what are the issues that need to be reformed and what is the other that cannot be reformed. However, after the Military Coup of 3 July 2013, the debate settles down with maintaining the status quo of the current form of the judiciary. This dissertation argues that the reform shall take place in Egypt. The current status of the judiciary is not the best for any political, social and economical development.

The dissertation is divided into six chapters, and introduction and conclusion. The first chapter is a historical background of the judicial development since 1949, which is the end date of the mixed courts in Egypt. The second chapter tackles the question of why is it important to have a reform. This chapter introduces political, economical, and social reasons to introduce a reform to the judicial institution. The last four chapters deal with four of the contemporary issues. These issues are judicial independence, judicial accountability, judicial appointment and judicial unification. Each chapter introduces the current status of the certain issues and the pending problems that need to be reformed. It, then, presents the solution to these issues in five countries, which are the United States, the United Kingdom, France, Germany and Russian Federation. After presenting each of these jurisdictions, each chapter offers an assessment to each solution offered from these different jurisdictions. Finally, each chapter offers a certain form of reform and the reasons to adopt such reform.

Dedication

To the loving memories of my grandparents

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Abbreviations:

MoJ	Egyptian Ministry of Justice
CoC	Court of Cassation
SJC	Supreme Judicial Council
SCL	Supreme Court Law
SCC	Supreme Constitutional Court
SCCL	Supreme Constitutional Court law
JAL	Judicial Authority Law
CTI	Committee of Temporary Issues
JID	Judicial Inspection Department
NCJS	National Center for Judicial Studies
IJM	Independent Judicial Movement
CAO	Central Auditing Organization
SCJI	Supreme Council for Judicial Institutes
SCSC	Special Committee for the State Council
MB	Muslim Brotherhood
SCAF	Supreme Council of Armed Forces
NDP	National Democratic party
ICC	International Criminal Court
SCD	Supplementary Constitutional Declaration
CAPMAS	Central Agency for Public Mobilization and statistics
MENA	Middle East and North Africa
GID	General Intelligence Directorate
BGB	German Civil Code (<i>Burgerliches Gestexbuch</i>)
OJC	Office for Judicial Complaints
ENM	<i>Ecole Nationale d'Administration</i>
CRA	Constitutional Reform Act
HMCTS	Her Majesty's Court and Tribunal Service

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Form of Reform:
Judicial Reform in Egypt
Lessons from the Developed countries

I. Introduction

Judicial reform occurs to ensure full protection of individuals' rights. The judicial authority is the last resort against brutal aggression from the executive branch against citizens' right. The lack of an independent and accountable judiciary would render it from enforcing such role. A priority reform to a judicial system has to start with these two concepts, as they are the core of serious judicial reform. Furthermore, the lack of judicial accountability and independence could potentially jeopardize human rights and liberties. For example, a Ministry of Justice, which chooses to interfere in judicial decision-making, may result in a judiciary lacking in independence on one hand. On the other hand, a complete lack of judicial oversight and accountability could have an opposite effect, and result in judicial corruption.

The development of the concepts of judicial independence and judicial accountability has passed through several iterations since 1880s. It started with a transplant of the first modern civil code from France in 1883.¹ The successive reforms reflect the growing understanding to what judicial independence and accountability should be. The reform of these two concepts took place twice during the monarchies during the period of 1880 until 1952. During these periods, the two concepts were progressed from absolute authority of the King over the judiciary to ensuring complete independence of the judiciary in 1925.

On the contrary, during the republic period (1952- present), successive presidents ensured their authority over the judicial power. The political regimes that followed the 1952 Revolution were determined to weaken the judicial system. Totalitarian regimes cannot tolerate an independent judiciary to compete its ultimate power.² The state developed a plan to eradicate judicial power in favor of the Social Party, which has different names with different presidents. This track started when the regime came down with a heavy hand on "disobedient" judges in an act called the "Massacre of Judges" (1965-1969).³ President Nasser did not stop at forced resignations of judges, but the aggression continued with jurist and law professors, which was represented in the infringement of al-*Sanhuri*.⁴

Beginning in 1970 and continuing through 2010, many judges who survived the massacre formed the "Independent Judicial Movement" (IJM). They campaigned and organized secret meetings to support their goal of judicial independence and reform in Egypt. The leading figures of this movement were al-*Gheriani*,⁵ *Mikky*,⁶ and *Genenia*.⁷ However, they were not able to enforce any reform to the system, as

¹ Ian Edge, *Comparative Commercial Law of Egypt and the Arabian Gulf*, 23 CLEVELAND STATE L. REV. 129 (1985), 132.

² EGYPT: DISCIPLINARY ACTION AGAINST JUDGES A CHALLENGE TO JUDICIAL INDEPENDENCE, Amnesty International, (April 2006), [HTTP://WWW.AMNESTY.ORG/EN/LIBRARY/ASSET/MDE12/007/2006/EN/AD6E6121-FA07-11DD-B1B0-C961F7DF9C35/MDE120072006EN.PDF](http://www.amnesty.org/en/library/asset/MDE12/007/2006/en/AD6E6121-FA07-11DD-B1B0-C961F7DF9C35/MDE120072006EN.PDF)

³ AMR SHALAKANY, *IZDIHĀR WA-INHIYĀR AL-NUKHBA AL-QĀNŪNIYYA AL-MISRIYYA* (2014), 10

⁴ Amr Shalakany, *The Trouble with Sanhuri*, (20 December 2006) <http://weekly.ahram.org.eg/2006/824/sc12.htm> Sunhari "formally accused Nasser of engineering the attack and instructed his wife to "shut the door in his face" when Nasser later came to pay a hospital visit. Flouting the independence of the judiciary, Nasser's regime eventually removed Sanhuri from his post along with a number of his court colleagues -- an early chapter in the later massacre of the judiciary in 1969"

⁵ *Gheriani* headed the Supreme Judicial Council from June 2011 to July 2012. He was appointed as the President of the Constituent Assembly 2012.

⁶ Previous Minister of Justice during the Muslim Brotherhood Government 2012

⁷ President of Central Auditing Organization 2012 till present

they were discovered and subsequently blacklisted by Mubarak Regime. The need for reform is manifested in the Egyptian Revolution of 1/25/11.

A glimpse of hope came for a year during ex-president Mohamed Morsi presidency, but was wasted due to the lack of a clear vision to the reform. The goals of the revolution ended with the military coup in 2013, and it temporarily ended any hope for to reform. The current regime (*al-Sisi* Regime) follows the steps of Nasser and Mubarak with regard to the judiciary. Currently, there is an ongoing “judicial massacre” of judges who are members of the IJM.⁸ After the failure of the Revolution, many judges are facing the same destiny as their successors. Many disciplinary trials to impeach judges from the IJM occur. During the period of 2014–2016, more than 200 judges were impeached in these trials. However, Egypt is in dire need of reform and of a new Sanhuri.⁹ The political changes in the region and the country are very fast. Once the reform chance comes, there must be a study that the can be implemented.

II. Research Objective and significance:

This research has three objectives. First, The research aims to document the current state of the Judiciary in Egypt. Many writers (Amr Shalakani and Nathan Brown) document post the 25th of January Revolution. Even though the research would use their work as a background to the documentation, the research takes one further step to document the history of after 2011. Secondly, the research presents a comparison of legal systems. The research compares the different legal system to evaluate the best judicial practices and to offer a solution from other states experiences and practices. The best solution must be based on the concrete cases study and detailed comparisons from different countries. Thirdly, the solution must be proved to be the best solution. The research not only targets scholars and practitioners, but it also targets politicians and lay people. The reform is costly process either in time, money or training. The research has to build its credibility with the people in order to be enforced.

The significance of the research implies in its scope on independence and accountability of the third branch of government, which is the judiciary. The Egyptian judiciary is one of the oldest judicial systems in the Middle East and North Africa (MENA) and for this reason, also one of the most influential. Even though the Egyptian judiciary system did not experience any additional reforms since El-Sanhuri in the 1940s, the concepts of judicial accountability and independence were maintained with different application, which lead to a gab between *de facto and de jure*. This is a result of the gap between de facto and de jure of these principles of judicial accountability and independence.

As for the scope, the analysis is limited to the process of judicial accountability in Egypt during the last century. It also proposes recommendations to the current state of affairs. It’s current shortcomings can be summarized as by the following: dependence on executive authority, disintegration of the court system (ordinary, administrative, and Constitutional courts), blatant interference of the Ministry of Justice in logistics and execution of Judges’ work,¹⁰ delayed execution of justice (due to the enormity and increasing number of cases), corruption of court employees, lack of basic facilities and

⁸ Ahmed Saliman, *37 kharqan fi mazbahat al-Qada'h fi misr*, (21 March 2015) <http://www.alaraby.co.uk/opinion/2015/3/21/>

⁹ Sanhuri (1895-1971) is a legal scholar and a judge. He transplanted the modern civil code in Egypt, Jordon, Libya and Syria. He also introduced the State Council in Egypt.

¹⁰ See, International Federation for Human Rights, *Judicial Councils Reforms for an Independent Judiciary. Examples from Egypt, Jordan, Lebanon, Morocco and Palestine*, (May 2009), 7 <http://www.unhcr.org/refworld/docid/4a83c4420.html> , see also, 2007 Report of the United Nations Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, «Addendum-Situations in specific countries or territories» 72.

infrastructure of courtrooms, and other crippling factors.¹¹ Members of the Judiciary believe that there is a need for judicial reform in order to ameliorate the aforementioned deficiencies. To take that further, I believe that we need to identify the failings and shortcomings of the current legal system in order to find solutions and actualize reform.

III. Research Questions:

The dissertation seeks to answer two main questions. First, how can this research demonstrate the urgency for reforming both the judicial independence and judicial accountability? After the most recent military coup in 2013, all calls for reform have been suspended. The research makes a counter argument to maintaining the *status quo* of both judicial independence and accountability. In order to establish the case, the research covers all the aspects of political, social and economic reasons for reform of the two aspects.

The second question that this research seeks to answer is what is the best manner of implementing reform for the judicial accountability while taking into account its relationship to judicial independence? The research will present different countries' approaches categorized by their government structure and more specifically, their judiciary. There is a significant difference among countries that have a common law system, those with a civil law system, and those with totalitarian regimes. In the former, countries would reflect judicial accountability in the checks-and-balance systems, whereas in the latter, countries would enhance the autonomy of the judicial authority. Such impotence would help other branch of government (executive and legislative) to relay on the third (judicial) to settle their problems.

IV. Methodology

Firstly, I use case study and library research methods. The research offers a detailed study of the judicial branch in Egypt. It presents the gap between the *de facto* and *de jure in* judicial accountability and independence rules. The gap between the previous two leads to an inefficiency and dysfunction of the system. The research would work on documenting this gap. I will also conduct a comprehensive review of literature. I consult resources in Arabic, English, French and German. I used the university library.

Secondly, I use the Comparative Law Method. I investigate the concepts of judicial accountability and judicial independence countries with well-established judiciaries and developed economies. It then compares them with that of Egypt. It highlights the different approaches of civil law systems and common law systems. The countries researched for the comparative component are France, Germany, United States, United Kingdom and Russia. There are two rationales for selecting these countries. Initially, these countries have old and controversial legal traditions. In the legal transplantation process, there are two main forms. The first form is the transplantation of the whole legal tradition, like India transplanting the English legal system, China transplanting the German Legal System,¹² or Turkey transplanting the Swiss legal system, Egypt transplanting the French Legal System. The second form is transplanting a mix of the two legal systems, like Japan in transplanting the lay judge system. Japan mixed the system of the lay judge (European form of public participation in justice) with the jury

¹¹ This problem tackled in NASSER AMIN, SLOW LITIGATION IN EGYPT: FACTS AND SOLUTION, Arab Centre for the Independence of Judiciary and the Legal Profession, 1997

¹² ZUHTU ARSLAN, RELUCTANTLY SAILING TOWARDS POLITICAL LIBERALISM: THE POLITICAL ROLE OF THE JUDICIARY IN TURKEY, (Terence Halliday, Lucien Karpik, and Malcolm Feeley, Fighting for political Freedom: Comparative Studies of the Legal Complex and political Liberalism ed.), 220.

system (the US legal form of public participation in justice) to form a new legal tradition of the lay judge system.¹³

Moreover, the legal relationship – as civil law countries- between these countries and Egypt make them appealing to the general legal community to accept patterns that are applicable in these countries. As for the civil law countries, the model that the framers in Egypt in early 1880 (and before) choose to be the pattern of the modern Egypt is the French pattern. They choose this system for many reasons that I address in the first chapter of this dissertation. As for the Germany legal system, I thought it would be the nearest system to adopt if the French was not able to find solution to the existing problem in the Egyptian Judiciary. This are two reasons for that claim. Firstly, the German legal system is civil law system, which is same as the French, even if they have many structural differences. Secondly, the German legal system grants more separation of power than the French, as the German still consider the judiciary as authority not as power.

As for the common law system, the United Kingdom legal system was the colonial power in Egypt when the French legal system was transplanted. This system is not only effect the way of the transplantation, but it also, as it is a monarchy system that works on weaken the judicial independence, tended to affect the relationship of the judiciary with the executive with certain ways. I would present these effects in first chapter as well. As for the American system, it is built on the principle of separation of power and judicial independence. Thus, it would be useful to present both legal jurisdictions.

Finally, for the post socialism state, when I start writing this dissertation, I did not think to include them. However, after a deep reading in the Egyptian modern history and the judiciary history, I found that I it was imperative to include these legal systems. Egypt adopted socialist ideas for more than 20 years. These years has affect all the concepts related to the judicial independence, separation of power, accountability and participation of the judiciary in the political life in Egypt. It still clearly has an effect on the present status of the judiciary in Egypt, as it is not yet fully reformed from that era.

V. Literature review:

A. Literature of judicial accountability and judicial independence:

The issue of judicial independence and accountability is immanent in the process of governance of state authorities.¹⁴ They are the twin goals of the judiciary.¹⁵ Judicial accountability consists of three categories: 1) institutions, 2) behavior, and 3) decisions.¹⁶ As for the institution, the people are the source of authority that institutions are to be accountable for. In regards to behavior, the criminal law is enough to settle any form of legal violation from the judges. It may take different procedures to ensure the fairness of the trial against the judge, but still is enough to trial the defendant, like *Nixon v. US*.¹⁷ As for the decisions, judges usually gain accountability through the mechanism of appeals or supreme courts. However, in the case where judges decide cases wrongly, judges violate their oath of office. In

¹³ Mathew Wilson, Prime Time for Japan to take another step forward in lay participation; Exploring Expansion to Civil Trials. 46 Akron Law Review (2013) , This article examines the system of lay judge in Japan. There are many articles that deal with lay judge in Japan. I was not sure if you need a basic one or one with analysis to the situation.

¹⁴ Shayonee Dasgupta and Sakshi Agarwal, *Judicial Accountability and Independence: Exploring the Limits of Judicial Power*, 2 NUJS L. REV. 779 2009, 779.

¹⁵ Alex Long, Stop Me Before I vote for this judge again: Judicial Conduct Organizations, Judicial Accountability ad the Disciplining of elected Judges, 106 W.VA.L.REV.1 (2003), 4

¹⁶ William P. Marshall, *Judicial Accountability in a time of Legal Realism*, 56 CASE W. RES. L. REV. 937 (2006), 937

¹⁷ 506 US 224 (1993)

this case, there must be clear and convincing evidence that “the judge knowingly or recklessly reached an erroneous decisions.”¹⁸

The literature of judicial independence is dominant in the field of the legal institutions, while there is less inquiry to the issue of the judicial accountability.¹⁹ The importance of accountability lies in several factors and can be achieved in several ways. For the accountability tools, there is no wide understanding of who is practicing judicial accountability. The opinions in that issue are very diverse. Some writers argue that the judicial accountability could be achieved through judicial councils.²⁰ Some other writers argue that judicial accountability could be achieved through judicial performance evaluation. This evaluation would be through “parliamentary accountability and appellate review.”²¹

US Supreme Court Justice Sandra O’Connor maintains that “judges must be accountable to the public for their constitutional role of applying the law fairly and impartially.”²² The independence of the judiciary is maintains in several constitutions. However, the case for judicial accountability is not always maintains in constitutions. It is the disputes that legal scholars and politicians fear to involve in while they are in the process of constitutional making.²³ Politicians resort to legislation to resolve the tension between the two interests.²⁴ The practice of the judicial accountability is either maintains in the judicial behavior from the senior judges or it is maintains in the national judicial laws.

For the importance of accountability, some writers’ arguments for maintaining judicial system accountable is to be able to counter corruption.²⁵ Accountability is meant to fight corruption and arbitrariness. It seeks to add integrity to the third branch of the government or state.²⁶ Others argue that judicial accountability aims to face the judicial delay. These writers based their argument on the judicial principle of “justice delayed, justice denied.”²⁷

On the other hand, the line between Judicial Accountability and Judicial Independence is blurry. The reason is the political-will or political interference/pressure on the judiciary.²⁸ The issue of over-judicializing public policy is increased with the enhancement of judicial independence.²⁹ In these cases, the judiciary is given more independence to resolve complicated issues. In turn, the more issues they solve, the more pressure for greater accountability, as the judiciary would be involved in answering more “functions from democratic processes.”³⁰ This process dilemma is clear in the contemporary post-revolution. I will further discuss this point in the next chapter.

B. Literature based on research methodology

¹⁸ *Id* 938

¹⁹ Nuno Garoupa and Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AMER. J. COMP. L. 201 (2007), 204

²⁰ *Id* 204

²¹ Stephen Colbran, *The Limits of Judicial Accountability; the Role of Judicial Performance Evaluation*, 6 LEGAL ETHICS 55 (2003), 55

²² Sandra Day O’Connor, *Judicial Accountability must Safeguard, not threaten, Judicial Independence: An Introduction*, 86 DENV. U. L. REV. 1 (2008-2009), 1

²³ Shimon Shetreet, *The Limits of Judicial Accountability: A Hard Look at the Judicial Officers Act 1986*, 10 U.N.S.W.L.J. 4 (1987), 4

²⁴ *Id* 4

²⁵ *Supra* note 14 at 881.

²⁶ *Id* 881

²⁷ Ziyad Motala, *Judicial accountability and court performance standards: Managing Court Delay*, 34 Comp. & Int’l L.J. S. Afr. 172 (2001) 172, *See Also*, David Steelman, *What have we learned about court delay: Local legal culture and case flow management since the late 1970’s?* 19 J. Sys. J. 145 (1997), 145.

²⁸ Nuno Garoupa and Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AMER. J. COMP. L. 201 (2007), 215

²⁹ *Id* 215

³⁰ *Id* 216

As for the relation of the literature review related to the methodology, the research consists of three approaches. Firstly, the literature relates to the history of the Egyptian judiciary. Most writers start this historical background with introduction of the mixed court, and the replacement of the Sharia'a courts in 1883.³¹ This date is the end date of Islamic *Sharia'a*. Some other writers would take an earlier approach in the historical study of the judiciary. Shalakany starts his book with the Mohamed Ali, the framer of Modern Egypt in 1805.³²

The second approach is legal approach. This approach is based on the legal development of the judicial law, which was in 1930s. The development of judicial law took place in three stages. The first stage started in 1930s, the second started after the collapse of monocracy in 1952, and finally the current law in 1972.³³ Furthermore, this approach deals with the legal analysis of the such laws, and their reflection on the judicial accountability.

The third approach deals with contemporary topics in the judicial development. This approach includes legal, factual and political situation of judiciary. This can be found in two types of resources, either newspaper or journals. This articles deals with every day issues related to the accountability and independence of the judiciary. There are some writers who are specialized in dealing with the judicial authority. The problem with this approach is sometimes affected with certain political agendas to these writers. To avoid such agendas, the research only presents these arguments without endorsing any of opinion except 1) the articles that describes certain action or behaviour, or 2) the article that offers certain reforms, which will be assess in the dissertation.

Secondly, the literature of judicial accountability is also connected to comparative law. This literature is consists of two approaches. Also, this type of literature has two approaches. First approach is case studies to certain country judicial reform. It depends on presenting the reform of certain country and how comparative law effect such reform (John Bell).³⁴ Second approach is comparison between different countries. These types of studies do not have analysis to the countries in the comparisons. It is only limited to present the situation as it is (Anja Seibert-Fohr).³⁵

Thirdly, resource connecting economics, statistics and judiciary are very limited in Arabic. The Ministry of Justice – as part of lack of accountability- does not formally release any data related to the performance of courts. These studies are available in the Ministry; however, it is not available to the public or for publication. While in English and French, these resources are available. There are many resources about accountability of the judiciary and statistics in United Kingdom. The courts and Tribunal Judiciary offers detailed statistics to the cases against judges. There are available data since 2009 available to the public on the website.³⁶

VI. Formulation of the Egyptian Judiciary

A) Branches of Egyptian Judiciary

1. Supreme Constitutional Court

The Supreme Constitutional Court is the competent judicial body that has the ultimate power over such disputes. However, litigants cannot resort directly to the constitutional court. They have first to get the approval of the regular, or administrative courts to resort to the supreme constitutional court. Establishment of the Supreme Constitutional Court has passed through two phases during Sadat's era.

³¹ Nathan J. Brown, *Shari'a and State in the Modern Muslim Middle East*, 29 INT'L J. MID. EAST STUD. 359 (1997)

³² Amr Shalakany, *IZDIHĀR WA-INHIYĀR AL-NUKHBA AL-QĀNŪNIYYA AL-MIṢRIYYA: 1805 - 2005* (2014)

³³ Judicial Authority law 1972

³⁴ John Bell, *JUDICIARIES WITHIN EUROPE: A COMPARATIVE REVIEW* (2010)

³⁵ Anja Seibert-Fohr (ed), *JUDICIAL INDEPENDENCE IN TRANSITION*, (2012)

³⁶ Statistics, Courts and Tribunals Judiciary (2015) <https://www.judiciary.gov.uk/publication-type/statistics/page/4/>

The first was the legal articulation of the basis of the SCC, and the second was the establishment of the court. However, the process of establishing the SCC started after the first constitutional document in 1923. In 1924, the Felony Court of Alexandria was approached with a request to rule out the unconstitutionality of the article 151 of criminal code. The court did not approve the request.³⁷

The first time the Egyptian courts recognized the unconstitutionality claim was in 1926.³⁸ The court did not declare the unconstitutionality of the law; rather it maintains its right not to apply the law. The previous court states that “the right of the courts to determine the constitutionality of certain law does not give it the right of annulment of laws in accordance with the separation of powers, rather courts would have to abstain from applying unconstitutional laws.”³⁹

Banning Egyptian courts from handling the issue of constitutionality of the law was based on many reasons. Firstly, even though the Egyptian civil legal system is based on the French system, application of the laws has turned into monarchy. It was a system that limited authority of the judiciary over that of the King’s act, and one of these acts is the law. Secondly, there is a lack of a legal foundation, which is more realistic, for such authority starting 1883 till 1971. There is no legal foundation- clearly states constitutional article- to give the courts the right to deal with the constitutionality of law.⁴⁰

The first time to legalize the constitutionality of laws was in 1953. This took place right after the 1952 coup.⁴¹ This legal endeavor had initially failed because members of the army refused any judicial supervision.⁴² The second legal attempt was in the Constitution of 1971. The constitution included five articles from 174 to 178. Firstly, it states that it should be an independent judicial body. Article 174 states, “The Supreme Constitutional Court shall be an independent judicial body with distinct legal nature in the Arab Republic of Egypt, and shall have its seat in Cairo.”

Secondly, the issue of competence tackling constitutional questions is addressed in the constitution. Article 175 states, “A Supreme Council, presided over by the President of the Republic, shall supervise the judicial bodies. The law shall prescribe its formation, competences and rules of procedure. It shall be consulted on draft laws regulating the activities of the judicial bodies.” This article was amended in 2007 to state that “{T}he Supreme Constitutional Court has the exclusive competence to control the constitutionality of laws and regulations and to interpret the legislative texts in the manner prescribed by the law. The law shall determine other competences of the court, and regulate the procedure to be followed before it.”

Finally, there is the question of time-gap between the first articulation of the SCC and the SCCL. It took 8 years (from 1971 to 1979), to establish the court. One of the reasons is the fear of independent judiciary that would deal with constitutionality of law.⁴³ Besides, there was a need after the shift to the market based economy in Egypt to have a SCC to oversee the legality of the laws. There was a need to ensure the rule of law in the country to attract foreign investment.⁴⁴

1. Ordinary or regular judiciary

The ordinary or regular judiciary is the main judicial body, stating regular jurisdiction. There are two exceptions regarding the jurisdictions of the regular judiciary. Firstly, the administrative cases fall

³⁷ *‘an al-Mahkamah, lamha tarikhayah*, Supreme Constitutional Court, Egypt, (2014)

<http://hccourt.gov.eg/Pages/About/history.aspx>

³⁸ *Id*

³⁹ *Id*

⁴⁰ *Id*

⁴¹ *Id*

⁴² *Id*

⁴³ Tamir Moustafa, *Law Versus the State: the Judicialization of Politics in Egypt*, 28 L. & SOC. INQUIRY 883 (2003), 886

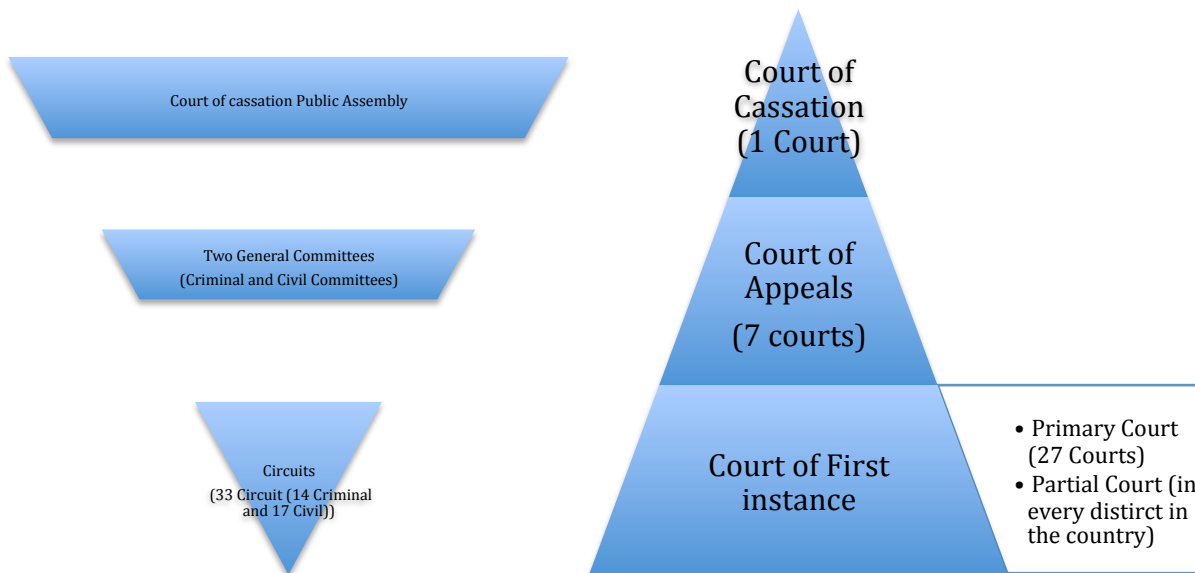
⁴⁴ *Id* at 889.

under the state council jurisdiction. Article 15 of the Judicial Authority law states that “except the administrative disputes, which the State Council is in charge of, the court is competent of every type of disputes and crimes.”⁴⁵ Secondly, the constitutional disputes fall under the jurisdiction of the Supreme Constitutional court. Article 192 of 2014 Constitution states that

The Supreme Constitutional Court is exclusively competent to decide on the constitutionality of laws and regulations, interpret legislative texts, and adjudicate in disputes pertaining to the affairs of its members. It is additionally in charge of handling disputes between judicial bodies and entities that have judicial mandate, handle disputes pertaining to the implementation of two final contradictory rulings. The first is rulings issued by any judicial body or an agency with judicial mandate; while the other is rulings issued by other bodies, and in disputes pertaining to the implementation of its rulings and decisions.⁴⁶

The Court of Cassation was established in 1931. It is the only court of its kind, where it is located in Cairo.⁴⁷ The Court of Cassation is not a court of facts rather it is a court of law. This means that the parties cannot bring new incidents to their case, while being at the Court of Cassation. The court only would rule whether the court of appeal has applied the correct understanding of the law.⁴⁸

The formulation of the Court of Cassation is based on three main entities. The first is public assembly. It consists of all judges member of the court, which includes President of the court, vice presidents and judges. The second entity is made up of the criminal and civil law committees. Each committee consists of 11 judges, chosen by Public Assembly members. The third entity is the court circuits that are made up of 33 circuits, of which 14 for criminal cases, and 17 for civil, commercial, family and labor cases.⁴⁹



The Court of Cassation is responsible for determining general legal rules applicable in disputes. It offers a unified understanding of the law, which all lower courts have to follow. The process of

⁴⁵ § 15 JAL (1972), this article was reflected in the new 2014 Constitution . Article 188 of the constitution states that “ The judiciary adjudicates all disputes and crimes except for matters over which another judicial body is competent. Only the judiciary settles any disputes relating to the affairs of its members, and its affairs are managed by a higher council whose structure and mandate are organized by law. “

⁴⁶ § 192 EGYPT CONST. (2014)

⁴⁷ § 2 EGYPT CONST. (2014)

⁴⁸ The Court of Cassation, {2013}, <http://www.cc.gov.eg/index-4.html#>

⁴⁹ § 4,JAL (1972),

developing these rules is restricted. It goes through three main stages. Firstly, one of the 33 circuits has to establish a new rule or overrule an existing one. This circuit has to transfer its new rule to the competent general committee –either civil or criminal- to determine the applicability of the new rule. Seven members of the competent committee have to agree on the new rule to be able to proceed to the next step. Secondly, if the new, or overruled ruling is accepted from seven members of the competent committee, the new rule is then transferred to both two general committees together. A majority of 14 out of 22 judges have to agree to consider a new legal rule.⁵⁰ Thirdly, a procedural rule shall be followed from the technical office of the court. This office is responsible for publishing the new rule to the general public.⁵¹

There are just six courts of appeal in Egypt. They are located in Cairo, Alexandria, Tanta, Mansoura, Bani Swaif, and Asiu, governorates.⁵² The circuits in the court of appeal consist of three judges. It has jurisdiction over civil and criminal cases. For civil law jurisdiction, it is only limited to appeal cases that are worth more than 40 thousand Egyptian pound. These types of cases are under the jurisdiction of the primary court (in the court of first instance jurisdiction). As for the Criminal law jurisdiction, the court of appeal is responsible for only felony cases. Until the present day, felony cases do not have an appeal level. It has been a request of many lawyers and politicians, to amend this law to include appeals to felony courts. The 2014 Constitution has included an article that mandates an appeal to felony court judgments. Article 96 regulates the due process principle. It states that “the law shall regulate the appeal of felony sentences.”⁵³ However, until the present day, there is no regulation to regulate appeal of felonies.

The current form of appeal is through resorting to the Court of Cassation. The Court of Cassation is court of law. It does not deal with facts of the case. If the Court of Cassation finds a wrongful legal interpretation to the law, it would order a retrial at a different circuit of felony courts of the same jurisdictions. In the second appeal to the Court of Cassation, it has either to grant the felony court judgment, or to rule itself in the case. In the second case, the Court of Cassation acts as court equity. It will hear all witnesses, accept new evidence, and hear all factual pleadings.

The court of first instance is divided into two different courts. The first called primary courts, while the second is called partial courts. The primary court is the upper court in the court of first instance. There is one court in each governorate.⁵⁴ It consists of many circuits, of which each circuit has to be three judges.⁵⁵ In civil law cases, the primary court has unique value jurisdiction. While it is considered as a court of first instance, for cases worth more than 40 thousand Egyptian pounds, it is considered as court of appeal for cases worth less than 40 thousand Egyptian pounds.⁵⁶ In criminal law matters, the primary court is considered as an appeal court for misdemeanor cases.

Secondly, the partial court is lower in the court of first instance, and consists of one judge. It is located in every district in the country.⁵⁷ It has jurisdiction over civil and criminal matters. As for criminal law jurisdiction, it is only limited to misdemeanor cases. The criminal procedures determine the definition of misdemeanor cases, as “a crime that has a punishment of less than 3 years in jail sentence.”⁵⁸ As for civil law jurisdiction, it has non-appealable jurisdiction over civil cases that are worth less than 5

⁵⁰ *Id*

⁵¹ § 5, JAL, (1972),

⁵² § 6, JAL, (1972), Egypt

⁵³ § 69 CONST. EGYPT, 2014.

⁵⁴ § 9, JAL, (1972), Egypt

⁵⁵ § 7, JAL, (1972), Egypt

⁵⁶ § 42 Civil and Commercial procedures law {November 9, 1968}, Egypt

⁵⁷ § 13, JAL, (1972), Egypt

⁵⁸ § 11 Criminal Law {1937}, Egypt.

thousand Egyptian pounds. If the amount determined in the case is less than 40 thousand pounds, the primary court acts as the appeal court for the partial court.⁵⁹

Unlike universal understanding, the role of prosecution is considered as a part of the executive authority.⁶⁰ In Egypt, the **public prosecution bureau** is considered as an integral part of the regular judiciary. The status of the public prosecution passed over development that leads to give prosecution a judicial characteristic, which is the current status of the prosecution. However, it is useful to track the changes in the nature over the past 65 years. The shift of the prosecution from an executive authority to a judicial authority has passed through three legal stages.

Firstly, the unified criminal procedure law was promulgated in 1951 after the abolishment of the concurrent mixed court and regular court systems in Egypt.⁶¹ The prosecution was a member of the executive authority during this period. The law is still enforced with some amendments, the investigative judge approach. Judges are responsible for the investigation, while the prosecutor's work is limited to prosecuting cases that have been investigated by judges. Article 63 of the Criminal Procedure law –before its amendment in 1998- states that “in misdemeanors cases, if the prosecution considers that there is a cause for investigation, it can refer the case to the investigative judge, or it can investigate the case according to article 199. In felonies, if the evidence collected is enough to proceed in the case, it shall refer the case to the investigative judge.”⁶² Accordingly, article 64 mandates each primary and partial court to have “enough number of investigative judges.”⁶³

While the person responsible for investigation is the investigative judge, article 199 gave the prosecution the same authority of the investigative judges. This article passed through two stages. The first was the first draft before the amendment. It states that “the public prosecution has the right to investigate the misdemeanor cases in accordance with provisions of investigation judge.” The second stage was – one year later- after the Military Coup of 1952. The article was amended to include both misdemeanors and felonies.⁶⁴ As a consequence, the prosecution enjoyed complete privilege of the investigation judge.

Secondly, even though the prosecution enjoyed the privileges of the investigative judge, the nature of the prosecution was still unclear, whether it is executive or judicial. The Court of Cassation had dealt this question in 1961. It maintains the mixed nature of the public prosecution. The judicial nature of the prosecution is presented in performing the role of the investigative judge, while the executive nature of the prosecution lies in every other work of the prosecution. The court states that “public prosecution is considered as an integral part of the regular judiciary. The legislator gives its members two types of authority. The first is investigation authority, while the second is prosecution authority. In performing their investigation duties, members of the prosecution are performing judicial work.”⁶⁵

⁵⁹ § 42 Civil and Commercial procedures law {1968}, Egypt

⁶⁰ For the executive nature of the prosecution, see Stephanie Dangel, *Is prosecution a core Executive Function? Morrison v. Olson and the Framers' Intent*, 99 YALE L. J. 1069 (1990), 1070., See also, Saikrishna Prakash, *Chief Prosecutor*, 73 GEO. WASH. L. REV. 521 (2004-2005), 589.

⁶¹ Egyptian Criminal Procedure Code (1950), which is based upon the Napoleonic Codes adopted in Egypt in the late 19th Century.

⁶² § 63, Criminal Procedures law, (11 November 1951); This article was amended in 2008. The amendment of the article made it optional to the prosecution to refer the case to the investigative judge to reflect the practice of prosecution of monopolizing the investigation of all cases. The amendment states that “in felonies and misdemeanors, the prosecution

⁶³ § 64, Criminal Procedures law, (11 November 1951); This article was amended in 2014 to reflect the development in the understanding of the role of the investigative judge and the public prosecution. The new amend states that “if the public prosecution bureau - in felonies or misdemeanors cases- saw that investigative judge would be more suitable to investigate the case, it can ask the primary court to appoint an investigative judge to deal with this case.”

⁶⁴ § 199, Criminal Procedures law, (11 November 1951);

⁶⁵ Court of Cassation, Case 1551, Judicial Year 30, (9 January, 1961).

Besides, the judicial authority law of 1972 reinstates the previous understanding of the mixed nature of the prosecution as member of both the executive and the judiciary. Firstly, it deals with the prosecution as a member of the judiciary. Secondly, it states that prosecutors and attorney generals are under the supervision of the Ministry of Justice . Article 125 of the judicial authority law states that “prosecutors follow their superiors and the attorney general, and they all follow the Minister of Justice . The minister has the right to control and supervise the prosecution, and its members.”⁶⁶ In 2006, this article was amended to reflect a new shift in the nature of the prosecution. The new amendment paved the road to the pure judicial nature of the prosecution instead of semi-executive/semi-judicial nature. The new amendment states that “members of the prosecution follows their superiors and the attorney general. The Minister of Justice has the right to control and supervise the administration of the prosecution and its members.”⁶⁷

Finally, the prosecution now is considered to be a pure judicial authority. After the long debate over the nature of prosecution, the current constitution considers it as member of the judiciary. However, it is not yet clear what would be the relationship between the prosecution and the Ministry of Justice . This would be part of the pending questions for the next judicial authority law. The judicial nature of the prosecution is based on Article 189 of the 2014 Constitution. It maintains the understanding of the relationship between the judiciary and the prosecution. Article 189/1 states that “The public prosecution is an integral part of the judiciary. It is responsible for investigating, law exempts pressing charges and prosecuting all criminal cases except what. The law establishes the public prosecution’s other competencies.”⁶⁸

Besides, article 189/2 eliminates any authority to the executive authority over the appointment of the attorney general. It states that “ Public prosecution is carried out by a Prosecutor General who is selected by the Supreme Judicial Council from among the Deputies to the President of the Court of Cassation, the Presidents of the Court of Appeals or the Assistant Prosecutor Generals, by virtue of a presidential decree for a period of four years, or for the period remaining until retirement age, whichever comes first, and only once during a judge’s career.”⁶⁹

2. Administrative judiciary

The state council is the administrative court. From 1949 to 1984, administrative courts were part of the executive authority. The first law to the State Council was law number 9 for year 1949, which was promulgated in February 3, 1949. The first article, it states that the State Council is an institute that is attached to the Ministry of Justice .⁷⁰ After the 1952 military coup, the army issued a new law that made the State Council as an independent institute, instead of the Ministry of Justice , attached to the Cabinet.⁷¹ In 1972, the new State Council law returned the supervision from the cabinet to the Ministry of Justice . In August 1984, the law was amended to give the State Council its full independence from the executive authority. The current formulation of article 1 of the law states: “the State Council is an independent judicial authority.”⁷²

The 2014 Constitution and the State Council law give the administrative courts exclusive jurisdiction over administrative disputes. Article 190 of the 2014 Constitution states “it is exclusively competent to adjudicate in administrative disputes, disciplinary cases and appeals, and disputes pertaining to its decisions. It is solely competent to issue opinions on the legal issues of bodies to be determined by law.

⁶⁶ § 125, JAL (5 October 1972), .

⁶⁷ *Id*

⁶⁸ § 189, CONST. EGYPT 2014.

⁶⁹ § 189/2, CONST. EGYPT 2014.

⁷⁰ § 1 State Council Law (1949), Egypt

⁷¹ § 1 State Council Law {March 29, 1955}, Egypt

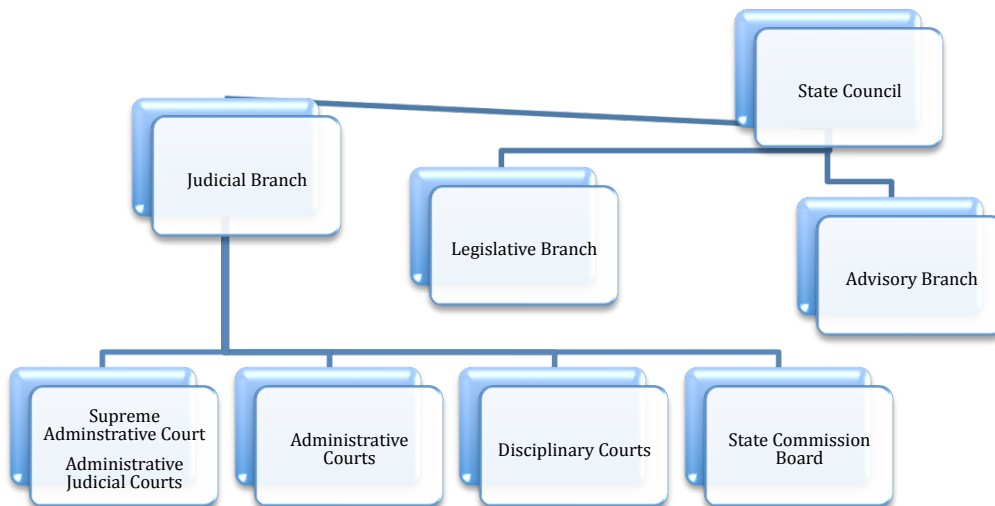
⁷² § 1 State Council Law {October 5, 1972}, Egypt

It reviews and drafts bills and resolutions of a legislative character, and reviews draft contracts, to which the state or any public entity is a party. Other competencies are to be determined by law.”⁷³

The state council consists of three different branches, as shown in the following figure. These branches are the judicial, legislative and advisory bodies. The judicial branch, as states previously, has an exclusive authority over administrative disputes. It consists of supreme administrative courts, administrative courts, Disciplinary courts, and a state commission board.⁷⁴ Additionally, the authority of the state council was mentioned in article 10. The law excludes from the jurisdiction of the court some types of the administrative disputes. Firstly, state council cannot deal with case that is related to acts of sovereignty.⁷⁵ Secondly, state council is not competent to handle disputes related to retired employees. This exclusion has five years limits.⁷⁶

The legislative branch is the competent branch for studying any law or regulation that the government (either the president or the cabinet) wish to issue. It can prepare such law or regulation to the government based by request.⁷⁷ The president of the legislative branch is the president of the State Council as well.⁷⁸ As for the advisory branch, it is competent for offering legal advice to the president, the cabinet, the ministers and public institutions.⁷⁹ Moreover, the law mandates that all governmental agencies – at all the levels of the government- in case of taking, accepting, or validating any contract, reconciliation, arbitration or arbitration award before taking the acceptance of the advisory branch of the state council.⁸⁰ Beside the judicial work of the advisory branch as judges, the law gives the right to the government to hire them to work as legal advisors to the president, the cabinet, the ministers and public institutions.⁸¹

Figure (X) State Council formulations



The Administrative Prosecution Bureau {hereinafter APB} was established in September 1954. The reason for which is to face frequent complains regarding the unfair administrative investigations. The explanatory memorandum of the first law of the administrative prosecution numerated the reasons for

⁷³ § 190 CONST. EGYPT 2014.

⁷⁴ § 3 State Council Law {October 5, 1972}, Egypt

⁷⁵ § 11 State Council Law {October 5, 1972}, Egypt

⁷⁶ § 20 State Council Law {October 5, 1972}, Egypt

⁷⁷ § 59/1 State Council Law {October 5, 1972}, Egypt

⁷⁸ § 70 State Council Law, Egypt

⁷⁹ § 63 State Council Law {October 5, 1972}, Egypt

⁸⁰ § 58/3 State Council Law {October 5, 1972}, Egypt

⁸¹ § 59/1 State Council Law {October 5, 1972}, Egypt

the necessity of establishing such institute. The first reason was the increasing number of the interference in the administrative investigation against the senior public officials.⁸²

The second reason is to unify the different legal departments that are responsible for investigating governmental officials. Instead of having a legal department within each governmental branch, there shall be one institute that is responsible for making the investigation with any public officials in all the governmental sectors. Thirdly, unified agency for investigation would give more technical and legal training and education to its members. The agency shall insure that all its members get the required training and education. Previously, each governmental agency was responsible of giving the required legal training to its lawyers, who are responsible for the investigations.⁸³

Development of the APB passed three stages. The first between the years of 1954-1958, the administrative prosecution was an institute attached to the Cabinet.⁸⁴ The second stage was during the period 1954- 2014, during which, the administrative prosecution was – and still is under the upcoming amendment- under the supervision of the MoJ.⁸⁵ The third stage is still a pending/current stage. It has already started the administrative prosecution – and the state cases authority as judicial authority. Even though the administrative prosecution is clearly attached to the MoJ. However, the administrative prosecution members, since 2012, started to lobby toward their independence from the executive authority. The members of the administrative prosecution wished to eliminate any interference from the MoJ.⁸⁶

The APB finally obtained independence. In the 2014 Constitution, Article 197/1 of states that “The Administrative Prosecution is an independent judicial body.”⁸⁷ It also gives them an exclusive authority over certain cases. Article 197/2 states that “it investigates financial and administrative irregularities. Regarding these irregularities, it has the authorities vested in the administration body to inflict disciplinary penalties ... It also initiates and conducts proceedings and disciplinary appeals before the State Council courts in accordance with the law.”⁸⁸

The importance of the military judiciary lays in two issues. Firstly, the military judiciary representatives were members in the constitute assembly, in all the constitutions after 25th of January revolution. They have played a vital rule not only in getting a special status in the constitution, but also in ensuring the applicability of civilian trials in front of the military judiciary. This was done to protect the army interests, to be discussed later in the research. As a result, the military judiciary has a special status in the 2014 Constitution that shall be addressed to present a complete picture of an alternative form of army justice system. Article 204/1 of the 2014 Constitution states that “{T}he Military Judiciary is an independent judiciary that adjudicates exclusively in all crimes related to the armed forces, its officers, personnel, and their equals, and in the crimes committed by general intelligence personnel during and because of the service.”⁸⁹

Secondly, the second paragraph of the previous article states the case that civilians can be trialed before a military court. It states that “civilians cannot stand trial before military courts except for crimes that represent a direct assault against military facilities, military barracks, or whatever falls under their authority; stipulated military or border zones; its equipment, vehicles, weapons, ammunition,

⁸² Explanatory memorandum, Administrative prosecution establishment law {September 16, 1954}, Egypt

⁸³ Explanatory memorandum, Administrative prosecution establishment law {September 16, 1954}, Egypt

⁸⁴ § 1, Administrative prosecution establishment law number 480 for year 1954 {September 16, 1954}, Egypt

⁸⁵ § 1, Administrative prosecution law {November 27, 1985}, Egypt

⁸⁶ al Mostashar ‘nani abd al-aziz, raeas alnayabah al-adarayah: la-na’tarad ‘la alwazefah al-madanayah, {2012}, <http://www.daralhilal.com.eg/print.php?id=3756>

⁸⁷ § 197/1 CONST. EGYPT2014

⁸⁸ § 197/2 CONST. EGYPT 2014

⁸⁹ § 204/1 CONST. EGYPT2014

documents, military secrets, public funds or military factories; crimes related to conscription; or crimes that represent a direct assault against its officers or personnel because of the performance of their duties.”⁹⁰ Many civilians are prosecuted and trialed during and after the revolution in front of the military judiciary. The total number of civilians trialed and prosecuted before the military judiciary since 25th January 2011 till November 2014 is more than 11, 000 citizens.⁹¹ In November 2014 only, 820 civilians were put to trial and prosecuted before the military judiciary. In December 2014, top leaders of the Muslim Brotherhood, the political group in power before military coup in 2014, were trialed and prosecuted before the military judiciary. This is increase of the interference of such judiciary in political and legal life in Egypt.⁹²

B. Judicial organization

There are three forms of organizations in the judiciary. The first is the formal organization. The Supreme Judicial Council is the only formal organization in the ordinary judiciary. The second is the semi-formal organization. This type of organization is for judges’ club organization. It is semi formal due to two reasons. Firstly, there is no formal judicial assignment to the judges club. Secondly, Egypt judges club includes all the members of the judiciary, either judges or prosecutors.

The third type of organization is the informal organization. In the contemporary history of the Egyptian Judiciary there is three informal organizations. Firstly, the secret organization *al-tanzeam al-sirrie* was established during the rule of Nasser. There is no doubt that such an organization is still present; however, there is no information about this organization, due to its secret nature. Hence, this research would not deal with them until more information is offered regarding their organization. Secondly, Judicial Independence Movement *Qoda’ al-istqlal* was established after the judicial massacre in 1969. Thirdly, Judges for Egypt *Qoda’ men ajl Misr* are formulated after the 25th of January Revolution. This section is limited to the two former organizations only.

In 1943, the first independent judiciary law was issued. This law formulated Supreme Judicial Council to be responsible for judicial issues like judicial appointments, transfers, and public judicial issues.⁹³ The SJC consist of eight members, who are the president of Court of Cassation, the representative of the Ministry of Justice, president of Cairo Court of Appeal, Attorney General, elected member from public assembly of Court of Cassation, elected members from the public assembly of Cairo Court of Appeals, and president of Cairo Primary Court.⁹⁴ The whole law was cancel upon the Military Coup in 1952.

In 1952, after the overthrowing of King Farouk, the military formed a loyal guardianship council with the aid of *al-Sanhuri*.⁹⁵ Judicial Independence law was amended in less than two months after the Coup. Article 34 of the law changed any form of elections in the formulation of SJC. Instead of electing two members- one member from the public assembly of Court of Cassation, and one member from public assembly of Cairo Court of Appeals- they were replaced with appointed members. The two new members were the president of Alexandria Court of Appeal and first vice president of the Court of Cassation.⁹⁶

⁹⁰ § 204/2 CONST EGYPT 2014

⁹¹ Egypt: Unprecedented Expansion of Military Courts, Decree Broadens Jurisdiction over Civilians, Human Rights Watch, {November 17, 2014}, <https://www.hrw.org/news/2014/11/17/egypt-unprecedented-expansion-military-courts>

⁹² Egypt: Surge of Military Trials, Decree Used to Send Protesters to Flawed Courts, Human Rights Watch, {December 18, 2014}, <https://www.hrw.org/news/2014/12/18/egypt-surge-military-trials>

⁹³ § 36, Judicial Independence Law {July 12, 1943}, Egypt.

⁹⁴ § 34, Judicial Independence Law {July 12, 1943}, Egypt.

⁹⁵ AMR SHALAKANY, *IZDIHĀR WA-INHIYĀR AL-NUKHBA AL-QĀNŪNIYYA AL-MIṢRIYYA*, (2013), 277

⁹⁶ § 34, Judicial Independence Law {September 14, 1952}, Egypt.

In 1956, a new judicial law was issued to reflect the unification between Egypt and Syria. The new formulation of the SJC reflected both territories. It included the president of the Court of Cassation, the first vice president of the Court of Cassation in the Egyptian Territory, the first vice president of the Court of Cassation in the Syrian Territory, president of Cairo Court of Appeal, president of Damascus Court of Appeal, member of the Egyptian justice department, member of the Syrian justice department, Egyptian territory attorney general, and Syrian Territory attorney general.⁹⁷ After the dissolve of the union, a new law was prorogated in 1965. It returned the formulation of the council to its old form. This form continued to be in force until the 1969.

During the period of 1969 to 2008, the Supreme Council for Judicial Institutes SCJI was enforced. The main role of SCJI was to supervise all the four judicial institutes, maintain the cooperation between them, advice all the judicial institutes in every matter, and propose judicial legislation to reform the judiciary. The SCJI included members from regular judiciary, state council, administrative prosecution and state case authority. When this law was promulgated, all the last three judicial institutes were under the supervision of either the Ministry of Justice or the cabinet, as discussed earlier. This council was biased to judicial independence, as it included members of the executive body, which do legal work for the government. When the current judicial authority law was issued in 1972, there was not any mentioning to the formulation of the SJC, as it was referred to it as SCJI.

In 2008, the law of SCJI was annealed. After the independence of the State Council from the government in 1984, it became a full independent judicial body. However, the administrative prosecution, public prosecution, and state cases authority were still member of the executive. Even though the Court of Cassation maintains that the public prosecution is member of the judiciary, it falls under the direct supervision of the MoJ. The new law replaced SCJI with Supreme Judicial Council SJC for the regular judiciary, and the Special Committee for the State Council SCSC. The current formulation of the SJC is similar to what it was after the 1952 coup. It consists of seven members, who supposedly represent the various entities inside the regular judiciary. They are the president of the Court of Cassation, first vice president of the Court of Cassation, Cairo court of appeal president, Alexandria court of appeal president, Mansoura court of appeal president (instead of the representative of the Ministry of Justice), and the Attorney General.⁹⁸

The judges club was established in 1939. Since its establishment, it has raised several controversial issues in its role and organization. This controversial nature was related to four issues of what are the social, legal, and political roles of the judges club. Firstly, it did not have a unique legal structure, as there is not regulated from either a special law or the judicial authority law. The club was established as a non- governmental organization. However, it is not fully under the supervision of the state or its agencies. The only regulation to the Judges Club is its own by-laws. This bylaw was negotiated and written by judges and prosecutors. It includes the rules related to the elections of the judges' club board, administration and financial issues.

Secondly, the Judges clubs is mainly a social club, with a branch in every governorate. The main judges one is located in Cairo, which is called Egypt Judges Club. The administration of the judges clubs is non-centralized, each having its own board. The members of the ordinary judges clubs are either judges or prosecutors. Any given judge or prosecutor can be a member of more than one club. For example, a judge can be member of Egypt Judges Club – located in Cairo- and member of Alexandria Judges Club.

Thirdly, Judges Club is not supposed to be involved in politics. The law of judicial authority bans both judges and courts from the involvement in politics. However, judges club has interfered in the politics

⁹⁷ § 82, Judicial Independence Law {February 21, 1959}, United Arab Republic {Egypt and Syria}

⁹⁸ § 77 bis 1, JAL {October 5, 1972}, Egypt

several times due to the interference from the executive authority in judicial independence.⁹⁹ In the past decade, this interference occurred two times. The first time was after the election fraud in 2005, while the second time was during the Muslim Brotherhood ruling period, as it is discussed in the research.

From 1970 through 2010, many judges formed the “Independent Judicial Movement-IJM”, where they organized secret meetings to support their goal of judicial reform. The leading figures of this movement were *El Gheriani*,¹⁰⁰ *Mikky*,¹⁰¹ and *Genenia*.¹⁰² However, they were not able to enforce any reform to the system, as the ruling government blacklisted them. After the January 25th Revolution, many IJM members are now appointed in high ranking judicial and political positions, a symbol of the political will to change the status quo. They are struggling to reinstate reform to justice administration in Egypt. As a first step, unification of the administrative, ordinary and Constitutional courts is a binding. When *El Gheriani* proposed the amalgamation of the members of these courts. Members of the judiciary, who benefit from the corrupt regime, met his proposition with stern opposition. After a detailed proposal for the unification of the judiciary, members of the State Council and the Supreme Constitutional Courts declared their refusal of the amalgamation of judicial bodies.

After 25th January 2011, a new judicial movement arises among the judges. This new group called itself Judges for Egypt *Qoda’ men ajl Misr*. There are many allegations that such group is connected to Muslim brotherhood. One of the leaders of this group is Waled Sharabi. He was photographed while leaving from Muslim Brotherhood’s headquarter in Moqatam- Cairo. After ousting the ex-president Mohamed Morsi, Waled Sharabi was impeached. Currently, he is criticizing the Egyptian judiciary from Turkey. Besides, this group participated in the sit-in of Muslims Brotherhood in *Rab’a* Square after ousting ex-president Mohamed Morsi. These judges condemned in a written statement the Military coup of 2013. This statement was read in public in *Rab’a* Square. As a results, the members of this group were either impeached or pending impeachment proceedings.

VII. Conclusion:

This introductory chapter meant to introduce the reader to the basic information regarding the Egyptian judiciary, their formulation, part of the controversial history and need for the reform. It includes the basic information that the reader would need to precede reading this book. The following chapters are not only an elaboration on the previous issues, but they work an endeavor to present the solutions to some of the contemporary problems of the judiciary, which are independence, accountability and appointment. Hoping that the reader would find it useful study regarding the reform in the Egyptian judiciary.

⁹⁹ ATEF SHAHAT SAID, THE ROLE OF JUDGE’S CLUB IN ENHANCING THE INDEPENDENCE OF THE JUDICIARY AND SPURRING POLITICAL REFORM (2008) {Nathalie Bernard-Maugiron ed. *Judges and Political Reform in Egypt*}, 115.

¹⁰⁰ *Gheriani* headed the Supreme Judicial Council from June 2011 to July 2012. He was appointed as the President of the Constituent Assembly 2012.

¹⁰¹ Previous Minister of Justice in the Muslim Brotherhood Government 2012

¹⁰² President of Central Auditing Organization 2012 till present

Chapter One:
The Reform Process in age of the Republic

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Chapter One:

The Reform Process in age of the Republic

I. Introduction:

The study of the Egyptian judiciary takes two main historical approaches. The first limits judicial study to certain eras. For example, there are studies that are limited to the monarchy, and deal with the mixed-courts and the role of foreigners in the Egyptian judiciary.¹⁰³ Other studies are limited to the Republic period,¹⁰⁴ focusing on the judgment of the Supreme Constitutional Court of 2000. Such studies deal with the judiciary, and focus on issues such as the election fraud.¹⁰⁵ The second approach breaks down the judicial history into stages. This approach focuses on the modern judiciary, and covers a time frame between 1883, when the modern court system was set up, to the present day.¹⁰⁶

This chapter aims to clarify history without any bias for, or against the Judiciary. Many studies have attempted to present the judiciary as the victim of successive regimes, starting with Nasser until Mubarak. However, this research argues that the judiciary was a strong partner, and ally to these regimes. In fact, the struggle was not between the regime and the judiciary, it was an internal conflict among the members of the judiciary. Members of the same institution inflicted many handicaps of the judiciary. This chapter attempts to prove the previous claim. Resources used in this chapter include the testimony of some judges that were published in print media, or from judges, and lawyers who had close ties with the judges in question. It does not however use many secondary resources.¹⁰⁷

The chapter breaks the history of the Republic to five main eras, which the shift from Monarchy to the Republic, Nasser's Era, Sadat's Era, Mubarak's era, Supreme Council of Armed Forces' Era, and Mohamed Morsi's Era. The first four eras were highly hostile eras against the judiciary, while the remaining period is very controversial periods.¹⁰⁸

I. The shift from Monarchy to Republic (1952-1954)

This era is divided over two phases. **The first phase** is characterized by full collaboration with the military between 23 July 1952, to March 1954. The first incident of such collaboration took place when the state council helped the army to get over the parliament. In July 1952, the Egyptian Army initiated a coup against King Farouk, and assigned Prince Ahmed Fuad II (born on January 16th 1952-present) to be the King of Egypt and Sudan instead of his father King Farouk. King Ahmed Fuad II became the king of Egypt while still a child. A guardianship council was formulated until the king comes of age.¹⁰⁹

The president of the State Council was *Abd al-Razzak al-Sanhuri*, who was also the mastermind of the military coup, and the best one to tackle the ensuing legal issues.¹¹⁰ When the army forced the King to leave the country, a problem erupted. Article 52 of the 1923 Constitution clearly regulated the

¹⁰³ REEM MESHAL, SHARIA AND THE MAKING OF THE MODERN EGYPTIAN ISLAMIC LAW AND CUSTOM IN THE COURTS OF OTTOMAN CAIRO, {2015}, *see also*, HAROLD TOLLEFSON, POLICING ISLAM THE BRITISH OCCUPATION OF EGYPT AND THE ANGLO- GGYPT STRUGGLE OVER CONTROL OF THE POLICE, 1882-1914, {1999}

¹⁰⁴ ROBERT HEFNER, SHARI'A POLITICS: ISLAMIC LAW AND SOCIETY IN THE MODERN WORLD {2011}, *see also*, RAYMOND WILLIAM BAKER, SADAT AND AFTER: STRUGGLES FOR EGYPT'S POLITICAL SOUL, {1990},

¹⁰⁵ NATHALIE BERNARD-MAUGIRON, JUDGES AND POLITICAL REFORM IN EGYPT {2008},

¹⁰⁶ See, NATHAN BROWN, THE RULE OF LAW IN THE ARAB WORLD, COURTS IN EGYPT AND THE GULF {1997}, *see also*, TAREK AL-BASHRI, AL-QADA AL-MASRY BAYN AL-ISTQLAL WE AL-IHTAWA {2006}

¹⁰⁷ SIAD AMIR ARJOMAND AND NATHAN BROWN (ED.), THE RULE OF LAW, ISLAM, AND CONSTITUTIONAL POLITICS IN EGYPT AND IRAN, Bruce Rutherford, *Surviving under Rule by Law: Explaining ideological Change in Egypt's Muslim Brotherhood during the Mubarak Era*, (2013), 250-252.

¹⁰⁸ Adel Omar Sherif, *Attacks on the judiciary: Judicial Independence- Reality or Fallacy?* 6 Y.B. ISLAMIC & MIDDLE E. L. 3 (1999-2000), 13

¹⁰⁹ AMR SHALAKANY, *IZDIHĀR WA-INHIYĀR AL-NUKHBA AL-QĀNŪNIYYA AL-MIŞRIYYA*, (2013), 277

¹¹⁰ IZDIHĀR WA-INHIYĀR at 277

swearing-in of a new king, upon the demise of the current one. The Article clearly mentioned ‘demise’ of the king death.¹¹¹

As a consequence to Article 52 of the 1923 Constitution, *Al Wafd* party, which was the leading opposition party in the dissolved parliament, came back to power. This had both legal and political repercussions. The political aspect was the army’s opposition to *Al Wafd*’s return to power. The party was then hugely supported.¹¹² As for the legal aspect, if *Al Wafd* party secured a majority in the parliament, it would possess the authority of appointing the guardianship council members. This in turn, was going to weaken the role of the army in this process.¹¹³

Al-Sanhuri, as President of State Council, proposed a legal solution to this political dilemma. He has managed to establish a new rule of law, rather than adhering to article 52 of the Constitution. His advice was to completely disregard the previous article, since the king was still alive. He has added a new article to the 1922 Royal Order, concerning managing the affairs of the throne. He proposed to add the following article: “upon overthrowing of the king, and the transfer of the royal duties to his minor successor, the Cabinet, in case the House of Representatives is dissolved, can formulate a temporary guardianship council that consists of three members ... the new guardianship committee, after swearing in, in front of the cabinet, takes over king’s responsibilities.”¹¹⁴ This solution; however was criticized by many scholars, as it contradicted basic legal rules.¹¹⁵

Secondly, *Al Sanhuri* has helped the army in eliminating all the King’s advocates from all government bodies.¹¹⁶ This process was referred to as the “cleansing committees.” The first legal step of cleansing the political life was regulating political parties. This law delegated ultimate power of political parties to the Minister of Interior.¹¹⁷ This makeshift law did not survive for long. In January 1953, a new law was issued to dissolve all political parties. It is not clear whether *Al-Sanhuri* was behind this resolution. The explanatory memorandum of law number 37 of 1953 stated “dissolving political parties, and the confiscation of their assets are in the best interest of the people. Dissolving these parties was to protect the country, and its future.”¹¹⁸

Thirdly, *Al-Sanhuri* played a major role in formulating the first constitution after the military coup of 1952.¹¹⁹ This was the last step in clearing out any impediments against the political life and the army, before it was time to turn against the mastermind of the whole plan, *Al-Sanhuri* himself. In March 1953, the constitute assembly, founded by the army, had finished drafting the 1954 constitution, which eliminated any role of political parties in the future of the country. The reason behind such opposition, at least for *Al-Sanhuri*, was political disagreement with *Al-Wafd* party.¹²⁰ *Al-Sanhuri* saw that the coup was a golden chance to rid the *Al Wafd* party of its popularity.¹²¹

The second phase signified the clash between the army and the State Council, represented by its President Abd al-Razzak Al Sanhuri. He has played a major role in eliminating dangers of political

¹¹¹ EGYPT CONST (1923) § 52 states that Upon the King’s death, both houses shall in accordance with the law convene within ten days as of the date of declaring the King’s passing. Should the House of Representatives be dissolved and the date appointed in the decree of dissolution for convention lie beyond the tenth day, the old House shall return to work until the succeeding House convenes.

¹¹² IZDIHĀR WA-INHIYĀR at 277

¹¹³ IZDIHĀR WA-INHIYĀR at 277

¹¹⁴ ROYAL ORDER OF THE THRONE (1922), § 11 Egypt

¹¹⁵ IZDIHĀR WA-INHIYĀR at 80

¹¹⁶ IZDIHĀR WA-INHIYĀR at 288

¹¹⁷ POLITICAL PARTIES LAW (1952) § 5 Egypt

¹¹⁸ Explanatory Momo POLITICAL PARTIES LAW (1952) Egypt

¹¹⁹ IZDIHĀR WA-INHIYĀR at 290

¹²⁰ IZDIHĀR WA-INHIYĀR at 291

¹²¹ IZDIHĀR WA-INHIYĀR at 292

parties. However; now it was time to get rid of Al-Sanhuri. The process of getting rid of administrative judiciary firstly required the elimination of any judicial power granted to the State Council.¹²² The second step came at the end of the Monarchy in June 1953. The constitution declaration in 1953, as well as the new constitution have worked together to put an end to the Monarchy in Egypt, and declared Egypt a Republic.¹²³ President Mohamed Najuib was the first President of Egypt, elected on June 18th 1953. As soon as President Najuib took office, disagreements erupted with Jamal Abdel Nasser. The majority of army officers supported Nasser. Najuib tried to solicit the support of Al-Sanhuri against his opposition, and Nasser.¹²⁴ However, Nasser was more powerful, and worked to bring down Najuib, as well as his supporters.

In March 1954, the army sent some of its supporters to protest in front of the State Council building. They shouted slogans against democracy, and Al-Sanhuri. The protest turned violent when some of the protestors assaulted Al-Sanhuri.¹²⁵ The revolutionary council of the army issued a law to ban 39 figures from their political rights, including Al Sanhuri. On November 15th 1954, President Najuib was sentenced to house arrest, which lasted more than two decades. Nasser took over as the President of Egypt.

Abusing the State Council and its founding father was far from over. A new law to regulate the affairs of the State Council was issued in March 1955. The new law has achieved several benefits. First, the administrative courts became a supplementary body to the Cabinet.¹²⁶ Secondly, it has set a retirement age to be sixty years¹²⁷, thus removing *Al-Sanhuri* from his office as President of the State Council. Thirdly, the law has bestowed full authority to the Cabinet to eliminate members of the State Council at its discretion.¹²⁸ As a result, Nasser has completely wiped out any resistance against his rule by the administrative judges.

II. The Socialist Movement 1952- 1970: The Recession of Judicial Reform

A. Nasser's Era: (1954-1970)

1. 1956 Constitution:

President Jamal Abdel Nasser was the mastermind behind various coups in the history of Egypt. He planned coups against King Farouk, King Fuad II, as well as President Mohammed Najuib. Nasser has always managed to rid himself of opposition.¹²⁹ It was then time to issue a new constitution to bestow legitimacy, and increase powers of the new President. The Constitution philosophy indicate that the President, or the King assign rules of the game. The 1956 Constitution was the first under the rule of Nasser, which stressed on independence of the Judiciary.¹³⁰ The constitution has also tackled judicial independence. Article 191 gave full immunity to all decisions taken by the army and its revolutionary council. It was part of the policy of ridding the country of the rules of law.¹³¹

¹²² IZDIHĀR WA-INHIYĀR at 293

¹²³ EGYPT CONST (1954), § 89

¹²⁴ IZDIHĀR WA-INHIYĀR at 293

¹²⁵ Adel Omar Sharif, *Attacks on the Judiciary: Judicial Independence – Reality or Fallacy?* 6 Y.B. ISLAMIC & MIDDLE E. L. 3 (1999-2000), 14.

¹²⁶ STATE COUNCIL LAW (1955), § 1 Egypt

¹²⁷ STATE COUNCIL LAW (1955), § 66 Egypt

¹²⁸ STATE COUNCIL LAW (1955), § 61 Egypt

¹²⁹ IZDIHĀR WA-INHIYĀR at 305

¹³⁰ EGYPT CONST (1956), § 175 stated that “judges are independent and power over them except the law, no authority has the right to interfere with pending cases or judicial affairs.”

¹³¹ EGYPT CONST (1956) § 191 states that “all decisions issued by the Revolutionary Command Council, and all the laws and decisions that relate to them and issued complementary or executing them, as well as everything that was issued from the bodies of the Council mentioned is formed of decisions or judgments, and all the measures and actions and behaviors

2. 1964 Constitution:

It would be unfair to portray Nasser as the only source of corruption. His corruption was coupled with ignorance of the public, as well as by the greed of some lawyers and judges who supported him. His apparent popularity was not only in Egypt, but also in all Arab countries. On the national level, his popularity among the poor people was already at its peak. He promulgated the first agrarian reform legislation. This legislation authorized the confiscation of land (exceeding 200 acres) owned by the aristocrats, and land owners.¹³² He then offered the ownership of five acres to each farmer.¹³³ There is no wonder that his totalitarian regime gained popularity among the poor people in Egypt. With his socialistic reforms, judicial independence was a secondary cause. On the regional level, Nasser has spearheaded the anti-colonist movement. He sent aid to Algeria and Syria to fight the French, and to Yemen to fight the British. The target behind his support to war-stricken countries, was formation of the Arab League. His bias to Arab countries against the colonization has by far increased his popularity in the region. He has turned his overwhelming popularity into a tool against judiciary, and a means for reform.

As a result of his growing popularity, both locally, and regionally, Nasser formed an Arab union between Egypt, Syria, Libya and Yemen. The new Union naturally required a new constitution to regulate its affairs. He, in fact, formed two Unions. The first was the Arab Union, while the second was the Arab Socialist Union. The Constitution of 1964 represented this difference. The constitution was applied for one of the shortest periods in the constitutional history of Egypt. It came to an end with the breakdown of the Arab Union, as well as the death of Nasser in 1970. The Union was dissolved four years after the enactment of the constitution.

The Constitution of 1964 was extended to expand the rule of the executive authority, over that of law. First, the constitution implemented a lower house, also called as *Majlas Al-Oma'h*.¹³⁴ Members of the house, were also members of the Socialist Union. There was no need to offer immunity to the legislation, as the previous constitution did, since the socialist union extended its authority over its members. Secondly, the judges were enjoying their independence, while the institutions was not yet independent. Article 152 stated, "Judges are independent."¹³⁵ There was no mention of the judiciary as an independent authority, though. This policy led to the interference in judicial affairs. Between 1964 and 1969, Nasser has enticed judges to join the Arab Socialist Union.¹³⁶ His attempt failed when the judges turned down his offer. They insisted that joining the Union would affect their independence and partiality.¹³⁷

3. Judges' Massacre in 1969:

Nasser's regime has witnessed several quivers during the last five years of his rule. The War of Six-Days (1967) led to the loss of major parts of Egypt and Syria. Continuity of the Union was practically impossible after the defeat in 1967. The collapse of the Arab Union left Nasser looking for victory to gain his powers. He turned to the judiciary for an alliance. When Nasser's regime initially failed to force judges to join the Union, he established a group of judges called the Secret Organization

that were issued from these bodies or of anybody other bodies established with a view to protecting the revolution and the system of government, and may not be challenged or calling for its abolition or compensated in any way and was in front of anybody."

¹³² AGRARIAN REFORM LAW (1952), § 1 Egypt

¹³³ AGRARIAN REFORM LAW (1952), § 9 Egypt

¹³⁴ EGYPT CONST, § 47 (1964)

¹³⁵ EGYPT CONST, § 152 (1964),

¹³⁶ MUSTAPHA KAMEL AL-SAYYED, THE JUDICIAL AUTHORITY AND CIVIL SOCIETY 230 (Nathalie Bernard-Maugiron ed.) (2008)

¹³⁷ *Id at 230*

“*Tanziem Sarie al-Tali’i*”¹³⁸ the role of which was to spy on judges. This bait was to attract greedy judges who had their eyes on elite posts in the judiciary. The lack of independent judiciary body was the main reason that encouraged Nasser regime to interfere in the judges’ affairs.¹³⁹ There was a need for an organizing body that protected the independence of the judiciary.

This entity was known as The Judges’ club. The club issued a statement to condemn the government’s solicitation for judges to join the Socialist Union in 1968.¹⁴⁰ It was the first step that the judges’ club took since its inception in 1939. The judges’ club has no formal, or legal status; it is neither mentioned in any Constitution, nor in the judicial authority law. The club is run and managed by regulations rather than law. Nasser’s regime was not able to enforce its rule over the club.

Nasser regarded the Club as the face of opposition and a threat to the secret organization he had earlier established. The organization he created, to ensure predominance over the judiciary, failed to get any seats on the board of the Club. The main aim of which was to gain legitimacy and lawfulness.¹⁴¹ Recurrent failure led to more antagonism against the judiciary. Under the call for judicial reform, the regime issued several laws, the first of which was to dissolve the board of the Judges’ Club.

The second law, number 83 of 1969, dissolved all judicial bodies, and gave the President the right to reappoint them. Article one dismissed all the members of the judicial bodies. It stated, “Judicial bodies shall be reformulated ... within 15 days of issuing this law.” Article two stated “President of the republic shall, during the period mentioned in the earlier article, take the necessary steps to reappointment members of judicial bodies in their current jobs, or in any other judicial jobs.” Those who were not included in the reappointment process have reached their retirement age. This has left more than 200 judges out of their judicial jobs. The consequences of this law were not addressed until 1972. The law was a clear violation of the Constitutional articles related to the immunity of judges and their independence.¹⁴² The Court of Cassation determined that Nasser’s law violated both the Constitution, as well as JAL. It maintained that the power given to the President is limited to emergency situations, which does not apply to the case of judicial authority.¹⁴³

III. Capitalism:

A. Corrective Revolution: From the Revolutionary to Constitutional Legitimacy

1. Was it a Corrective Revolution?

It was President Sadat who named the Revolution, after disputes with Nasser’s loyal associates in the government (called the centers of powers). The Centers of powers were responsible for various central agencies and ministries in the country. The Group included Ali Sabri (ex-Vice President), Sharawi Jom’a (Minister of Interior), and Mohamed Fayaq (Minster of Information). Nasser has used them to ensure his totalitarian rule. However, members of this group did not show the same support to President Sadat. Sadat then took the decision to change his strategy from revolutionary legitimacy, as in Nasser’s regime, to constitutional legitimacy.¹⁴⁴

Revolutionary Legitimacy became his tool to end opposition. When President Sadat ascended to power, he faced the same problem of not being able to rule the country. There were still many pro-Nasser supporters in power. On May 15th 1971, he declared the start of the Corrective Revolution. He stated

¹³⁸ ATEF SHAHAT SAID, THE ROLE OF THE JUDGES CLUB IN ENHANCING THE INDEPENDENCE OF THE JUDICIARY AND SPURRING POLITICAL REFORM 112 (Nathalie Bernard-Maugiron ed.) (2008)

¹³⁹ *Id at 113*

¹⁴⁰ *Id at 113*

¹⁴¹ *Id at 114*

¹⁴² EGYPT CONST (1964) § 157 states “judges cannot be dismissed from their jobs.”

¹⁴³ Court of Cassation – session of 21/12/1972.

¹⁴⁴ AMR SHALAKANY, IZDIHĀR WA-INHIYĀR OF EGYPTIAN LEGAL ELITES, (2013), 319

that “he will never relinquish his responsibility as President, and he will not permit any ‘center of power’ to rule, whoever they were, or whatever power they claimed to have ...”¹⁴⁵ On July 23rd 1971, he stated in his speech to the public “today we meet for the first time without Jamal ... we need to get used to loyalty and love. We shall build our new society; our new Egypt ... conspirators were brought to court and have been duly punished.”¹⁴⁶ After he eliminated his rivals, he declared the success of the Corrective Revolution. He then met with the judiciary representatives, and stated “I am responsible for the supremacy of law, and I will work to legalize the Revolution. I will not allow any endeavor to violate the freedom of the country and its citizens. I promise to break down any center of power, whoever that might be ...”¹⁴⁷

2. The New Constitution and Judiciary

The first legal step that Sadat took to move from the revolutionary legitimacy to legal constitutionally was promulgating the constitution of 1971. The constitution did not deviate much away from the socialist tendency towards a more capitalist one; rather it ensured more freedom and rights to the citizens. This was comparable to the constitution of 1923.¹⁴⁸ The constitution, however, made a shift from socialism to democratic socialism.¹⁴⁹ This shift has maintained the role of the judiciary to uphold a democratic state. Article 65 of the 1971 Constitution stated “The State shall be subject to the law. Independence and immunity of the judiciary are two basic requirements to safeguard rights and liberties.”¹⁵⁰

Independence of the judiciary was further elaborated in chapter four of the 1971 Constitution. The constitution made a clear distinction between judicial independence and independence of the judges, even though the judicial law did not reflect such a distinction. The constitution maintained independence of the judiciary as an authority.¹⁵¹ Moreover, the constitution ensured the accountability of judges without any prejudice.¹⁵² Additionally, the constitution maintained the presence of the judicial council to ensure proper judicial management.¹⁵³

3. The New Judicial Law (1972- Present)

The 1971 constitution has made a clear distinction between judicial independence and that of the judges. A new JAL was issued that reiterated total independence mentioned in the 1971 constitution. However, such a distinction was not effectively applied in JAL, and was criticized by several judges.¹⁵⁴ Firstly, the law, prior to amendment, gave the public prosecution bureau the right to supervise courts’ funds.¹⁵⁵ This article is still sustained. Secondly, the President has the right to transfer, and reassign judges in other judicial, or extra-judicial work.¹⁵⁶ Thirdly, courts did not have any right to handle cases that are directly, or indirectly related to acts of sovereignty.¹⁵⁷

¹⁴⁵ *Khatab thawrat al-Tashih le-raes al_Sadat*, YouTube (0:30- 0:40}, https://www.youtube.com/watch?v=awJ4Kp_91H0

¹⁴⁶ *Khatab al-Sadat b'd thawarat al-tashaih 1971*, YouTube {0:00- 0:30},

<https://www.youtube.com/watch?v=5nFYFslpxaU>

¹⁴⁷ *Thawarat al-Tashih*, 15 May 1971, YouTube {5:30-6:00}, https://www.youtube.com/watch?v=Mqzp_4whsTI

¹⁴⁸ James Feuillet, *reforming Egypt’s Constitution: Hope for Egyptian Democracy?* 47 TAXES INT’L L. J. 237 (2012), 242

¹⁴⁹ Mohamed Abdelaal, *Egypt’s Constitution: What Went Wrong?* 7 VIENNA J. ON INT’L CONST. L. 200 (2013), 203

¹⁵⁰ EGYPT CONST. § 65 (1971)

¹⁵¹ EGYPT CONST § 165 (1971)

¹⁵² EGYPT CONST § 167 (1971)

¹⁵³ EGYPT CONST § 168 (1971)

¹⁵⁴ NATHALIE BERNARD-MAUGIRON, *JUDGES AND POLITICAL REFORM IN EGYPT*, 5 (2008)

¹⁵⁵ JAL (1972) § 28 states, “the public prosecution is the responsible for the all the monetary work of the courts”

¹⁵⁶ JAL (1972) § 53

¹⁵⁷ JAL (1972) § 16

Fourthly, JAL granted the judicial inspection department and the Minister of Justice more authority over the impeachment of judges. Judicial inspection is part of the Ministry of Justice, and fall under direct supervision of the Minister of Justice.¹⁵⁸ Besides, article 93 gave the Minister of Justice the right to supervision over courts and judges.¹⁵⁹ The same Minister has the ultimate power to appoint presidents of primary court judges.¹⁶⁰

B. Relationship with the Judges Club (Sadat as honorary head of Judges club)

The judges' club never enjoyed amicable relationships with any of the Egyptian presidents except with President Sadat. After he declared his bias to the rule of law, he gained the love and trust of the judges at the beginning of his rule. Sadat did not deny his responsibility regarding decisions taken during Nasser's era. He, in fact, attempted to remedy the consequences of the massacre of the judiciary, which occurred 3 years prior to his rule. He had reinstated all the judges that Nasser had removed from office. The judiciary, judges and institution, have welcomed Sadat, and the new channel of communication that he opened with them. He reinstated the rule of law and judicial independence, privileges that was taken away from judges during the Nasser's era.¹⁶¹

The Judges' Club has also honored Sadat, and made him an honorary president. Such a position was never granted to any previous or later presidents. Part of the improved relationship, was Sadat's attendance of the annual celebrations of the Club. Judges used even to criticize Sadat for his legal strategies, a relationship not maintained during Mubarak's period. Sadat has gracefully embraced the president of the Club's criticism of him and his policies. Chancellor Mohamed Wajdi Abd al-Samad stated in front of Sadat:

The judiciary is neither a profession, nor a public domain. Judges' ruling cannot be abolished or amended except from a similar judge. This calling has its reverence and sacredness, since it functions on the protection of freedom, and the law. No matter how valuable justice is, injustice is more damaging. Unless judges are fearless and are able to enforce the law, the jungle law will prevail. As a consequence, states will lag behind; lose their wealth, and their strength. Judicial independence, both for the institution, and the individuals, should ensure the rule of law and legitimacy. Protection to individuals' rights shall be based only public law, procedures and in front of judiciary ... We {judges} have discussed the {judicial} law in this club. If anything has troubled you, you are the one to blame. You {Sadat} have set the freedom of rights free. You {Sadat} are the one who asked for opposition and criticism. You {Sadat} believe that free regimes, establish free nations. Besides, even though democracy has plenty of drawbacks, it does not match one fault of dictatorship ...¹⁶²

C. The End of the Emergency Law in 1978:

A state of emergency was declared in the country during the Arab-Israeli "Six-Day War" in 1967, and was extended until Nasser's death. When President Sadat took office, he maintained the state of emergency until 1978. He used it to ensure his control and power over the country; but later on abolished it. However, it was rather hard for Sadat's regime to continue by means of complete democracy. In April 1980, he promulgated the "Shameful conduct" law.¹⁶³ When the draft of the law

¹⁵⁸ JAL (1972) § 78 states, " the judicial inspection Unit at the Ministry of Justice is responsible for inspection over the work of judges and presidents of primary courts."

¹⁵⁹ JAL (1972) § 93 states stated, "the Minister of Justice has the right to supervise all courts and judges. The president of the primary court and general assembly of the certain court, has the right to supervise all the judges working in this court

¹⁶⁰ JAL (1972) § 76

¹⁶¹ IZDIHĀR WA-INHIYĀR at 322

¹⁶² al-Qadi we-al-Raes, al-Mostashar Abdel Samad le-Sadat, You tube, {2:00-4:00} {April 27, 2013},

<https://www.youtube.com/watch?v=hK8nWSD3y5E>

¹⁶³ Raymond William Baker, *Sadat's Open Door: Opposition from Within*, 28 SOC. PROBS. 378 (1980-1981), 384

was first published in newspapers, leaders of the political parties condemned it.¹⁶⁴ The law included articles that contradicted with the constitutional rights granted in the constitution.¹⁶⁵

A debate ensued; one of the first opinions was that of the government. Mustafa Khalil, the Ex-prime Minister during Sadat, stated “the aim of the law is the protection of society and the regime. It is not a sanction imposed on any individual.”¹⁶⁶ The opposition declared that the law aimed to expand the authority of the executive body, over that of legitimacy.¹⁶⁷ This debate did not last for long, it came to an end with the end of the Sadat’s rule. President Sadat was assassinated after 18 months of issuing the law, on October 6th, 1981. President Mubarak took office 8 days later, and he again declared the state of emergency, which lasted to the 2011 Revolution.

D. The new constitutional court - 1979:

The Supreme Constitutional Court has passed through two phases during Sadat’s era. The first is the legal articulation of the basis of the SCC, and the second is the establishment of the court. However, the process of founding the SCC, started after the first constitutional document in 1923. In 1924, the Felony Court of Alexandria received a plea of the unconstitutionality of Article 151 of criminal code. The court rejected the request.¹⁶⁸

The first accepted claim of unconstitutionality was received in 1926.¹⁶⁹ Even though the court did not affirm unconstitutionality of the law; it reserved its right not to apply the law. The previous court stated “the right of the courts to determine the constitutionality of certain laws does not give it the right to annul laws in accordance with the separation of powers. Instead, courts have to abstain from applying unconstitutional laws.”¹⁷⁰

Banning Egyptian courts being addressing the constitutionality of some laws is based on many reasons. Firstly, even though the Egyptian legal system is civil, and is based on the French legal system, the law was applied within a monarchy. Secondly, there has been no legal foundation of such authority from 1883, until 1971. There is a lack of a direct constitutional article that bestows on the courts the right to deal with the constitutionality of laws.¹⁷¹

The first time that the constitutionality of laws was legalized was in 1953, following the 1952 coup.¹⁷² This legal attempt had failed when members of the army refuted judicial supervision of laws.¹⁷³ The second attempt was included in Constitution of 1971. The constitution was comprised of five articles, from 174 to 178, and which maintained independence of the judicial body.¹⁷⁴ Secondly, addressing competence in answering constitutional questions was stated in article 175.¹⁷⁵

¹⁶⁴ Mahmoud Mo’ad, *Hakayat awal Qanown yahmal ism al’ib*, {06/08/2011}, Ahram, <http://www.ahram.org.eg/archive/Issues-Views/News/82750.aspx>

¹⁶⁵ *Id*

¹⁶⁶ *Id*

¹⁶⁷ *Id*

¹⁶⁸ *‘an al-Mahkamah, lamha tarikhayah*, Supreme Constitutional Court, Egypt, (2014)

<http://hccourt.gov.eg/Pages/About/history.aspx>

¹⁶⁹ *Id*

¹⁷⁰ *Id*

¹⁷¹ *Id*

¹⁷² *Id*

¹⁷³ *Id*

¹⁷⁴ EGYPT CONST. (1971) § 174 states, “The Supreme Constitutional Court shall be an independent judicial body with distinct legal personality in the Arab Republic of Egypt and shall have its seat in Cairo.”

¹⁷⁵ This article was amended in 2007 to states that “The Supreme Constitutional Court has the exclusive competence to control the constitutionality of laws and regulations and to interpret the legislative texts in the manner prescribed by the law. The law shall determine the other competences of the court and regulate the procedure to be followed before it.”

It was time to address the gap between the first articulation of the SCC, and the SCC law. It took 8 years to establish the court, from 1971 to 1979. One of the reasons was the fear of an independent judiciary that would tackle constitutionality of the law.¹⁷⁶ Besides, after the shift to a market-based economy, there was a need to oversee the legality of the laws. It was mandatory to ensure the rule of law, to attract more foreign investments.¹⁷⁷

IV. The Judiciary During Mubarak Era: 1981- 2011

A. Introduction:

Mubarak did not make any constitutional changes like his predecessors, Sadat and Nasser. He held office within ideal circumstances. One year earlier, in 1981, Sadat stroke a deal with the Islamic group to make Islamic Sharia'a an intrinsic part of the constitution; in return for long terms in office. The duration of presidency was limited to two terms.¹⁷⁸ The referendum added one letter to the word 'period' to change it into 'periods.' This constitution, more so this article, gave Mubarak the legitimacy to stay in office for 30 years. The first time Mubarak considered constitutional amendment was in 2007.

Between 1984 and 2000, there was no real conflict between the judiciary and the executive authorities. Successive extensions of the state of emergency, and governmental war on terror and radicals (*Jama'at Islamiyah*), have led the judiciary to accept slow reform. Members of the judiciary have made numerous calls for reform. However, the regime was not willing to increase judicial independence. Both authorities maintained the status quo, until the elections of 1995, and 2000.

B. Prying on Judges: (1981-1985)

The first clash between judges and Mubarak's regime was during the trial of the assassin of President Sadat. On October 6th 1981, five army officers assassinated Sadat during the ceremonial march commemorating Egypt's victory against Israel in 1973. These officers were military intelligence officers: Colonel *Abbud Al-Zumar*, former captain, air defense *Abd al-Hamid al-Salam*, first lieutenant *Khalid Islambouli*, first lieutenant- engineer *Atta Tayal*, and Sergeant, sniper *Hussein Abbas*, who took the first deadly shot at President Sadat. The ministry of justice chose Chancellor Abd Al Gaffer Mohamed to be the chief judge to the assassination, and the Islamist Jihad cases.

Chancellor *Abd al-Gaffer* died in 2009. Two years before his death, he gave his last interview and refused to have it published until his death. The importance of his interview is manifold. Firstly, he is a man of enormous experience who investigated many important cases like the 1967 defeat. Secondly, he only gave two public interviews in his whole life. The first is unavailable, while the second, given in 2009, is. Thirdly, he gave a rare insight and testimony on internal judicial affairs, especially during the eras of Nasser, Sadat and Mubarak. Fourthly, everyone involved in the above cases, testified to his

¹⁷⁶ Tamir Moustafa, *Law Versus the State: the Judicialization of Politics in Egypt*, 28 L. & SOC. INQUIRY 883 (2003), 886 . EGYPT CONST. (1971) § 175 states, "Supreme Council, presided over by the President of the Republic, shall supervise the judicial bodies. The law shall prescribe its formation, competences and rules of procedure. It shall be consulted on draft laws regulating the activities of the judicial bodies."

¹⁷⁷ *Id* at 889.

¹⁷⁸ The deal between Sadat and the Islamist to pass the reform was misleading to the Islamist. The Islamic law has been always the source of legislation based on Egyptian Civil Code of 1948 article 1. It states that "Provisions of laws govern all matters to which these provisions apply in letter or spirit. In the absence of a provision of a law that is applicable, the Judge will decide according to custom and in the absence of custom in accordance with the principles of Moslem Law. In the absence of such principles, the Judge will apply the principles of natural justice and the rules of equity."

fairness and integrity, and reluctance against any intervention in his work, form the executive authority.¹⁷⁹

In his interview, he addressed many issues of which two are relevant to this section. Firstly, he stated how he was approached by the President of the felony court of Abdeen, to handle the case of “Grand Jihad”, (1981-1984). He said that he dictated a number of terms to accept the offer. His terms included: acceptance of the public assembly of the Cairo Court of Appeal to handle the assignment, that none of his aides be replaced, as well as no intervention in his ruling. The president of the court accepted his terms and the case was assigned to him. On the personal front, he has requested the freedom of his son, who was a political detainee.¹⁸⁰

Secondly, he demonstrated his methods ruling, and how he faced various attempts to reverse previous agreements between him and the President of the primary court. He stated that he dealt with various attempts of intervention from the public prosecution bureau, and the Minister of Justice. During the trial, he had noticed that many of the defendants, who were around 300, were missing. He inquired about this, from Prosecutor Raja al-Arabi, who was later the attorney general (1991-1999). Mr. El Arabi advised him to issue an order forcing the defendants to come to trial, a suggestion that the Chancellor refused. He stated that this was blatant interference in the case, which he totally refuted.

Besides, there were doubts that the government was prying on the communications of Chancellor Abd al-Gaffer and his colleagues in the court. He did not explicitly mention whether prying included him personally.¹⁸¹ He had stated that there are certain topics, of national security nature, that he will not discuss. Additionally, Chancellor Adel Fargali, ex-president of State Council has confirmed that prying took place over the judiciary’s communications. He also mentioned that they used to deliberate in restrooms to avoid violation of their privacy.¹⁸²

After his death, an interview was conducted with his daughter. According to her, he had a fear that he would be assassinated by the regime. He instructed his family that the cause of his death should be examined, and his body sent for autopsy. His daughter stated that after her father’s death, national security officers came to their house. They seized all documents that were in his library. She did not know what these documents contained. She added that her father was very secretive of his work. However, she knew that they took documents that are related to many important cases that he tried.¹⁸³

C. The Clash between Judges’ Club, and the State of Emergency (1986- 1990)

Mubarak had hoped to walk in the steps of Sadat. In 1986, he attended, for the first and last time, the annual meeting of the Judges’ club. Before the meeting, he had renewed the state of emergency that was firstly declared in his era directly after Sadat’s death. The president of the Judges’ Club criticized Mubarak’s step of declaring the state of emergency. He advised him to use article 74 of the

¹⁷⁹ Moahedm Radi Mas’od, Abd al-Gaffer Mohamed we qadayat moqtal al-Sadat, {23 April 2009}, <http://www.mohamoon-montada.com/Default.aspx?action=Display&ID=87342&Type=3>

¹⁸⁰ Al-Mostashar Abdel Gafar: Abo Basha qal li an Israel talabat I’dam Khalid Islamboli qabal insahabaha men ra’as Mohamed, {28 November 2009} ,

¹⁸¹ al-qada al-masry bayan 7 ‘ohowd, sasapost, 28 March 2014, <http://www.sasapost.com/egyptian-judiciary-and-authority/>

¹⁸² Tahat al-Majhar: bayan al-‘adalah we-al-sayaf- Jazirah, (26;00-27:00) January 2012, (<https://www.youtube.com/watch?v=AcyZ5kAV6CE>)

¹⁸³ Mahmoud Sa’d al-Din, *ibnatal-mostashar al-rahah abd al-Gaffar: awsa waladi be-ersal kol awara al-tahqiqat qadayaha Salah Nasser we-Amer we-khazanat Nasser le-amn al-dawlah*, Youm 7 {18 December 2009}, <http://www.youm7.com/story/0000/0/0/-/167418#.VnkeDZNuk1g>

Constitution in order to follow the rule of law, instead of using the emergency legislation.¹⁸⁴ During the meeting, Chancellor *Mohamed al-Rafa'i* stated:

Your highness Mr. President Mohamed Hosni Mubarak, we wish that the emergency state would not be extended, as it did not prevent previous acts of riot. Since it was extended yesterday, the decision of bringing it to an end is only in your hands ... by one word from you ... we wish that the situation is feasible in the near future ... If you choose resort to article 74 of the constitution, it would be constitutionally correct, for the first time. However, you did not use it.¹⁸⁵

After that meeting, Mubarak expressed his anger at *Mohamed al-Rafa'i*'s words, which did not match what they have agreed on. It was his last time to come to the Judge's club.

D. The Dominant period of the Ministry of Justice over the Judges Club (1990-2000);

During that decade, the relationship between the judges and the state was uneventful. Chancellor Moqbal Shaker has won the elections to replace Chancellor *Mohamed al-Rafa'i* as President.¹⁸⁶ Moqbal had a clear policy regarding judicial independence, and its relationship with politics. He expressed his views explicitly after his retirement, and previously as President of the Supreme Judicial Council. His point of view is a reflection of JAL that prohibits any interference of politics in the judiciary.

Chancellor Moqbal Shaker had completely denied allegations of intervention of the executive authority in the judiciary, and the judicial independence movement. He denied any relationship between judges, and the executive authority. When he was asked on the independent movement, he completely refuted even the existence of such a group. He stated, "There is nothing called judicial independence movement, as it is not factually true ... the judiciary is independent through the conscience of each judge. Every judge in Egypt is fully independent ... JAL closely follows judicial independence, and the constitution signifies protection for the judicial independence." He further stipulated "there shall be no politics in the judiciary ... such action occurs during the elections of the Club; however, there is nothing called the judicial independence movement."¹⁸⁷

Chancellor Shaker's views on the connection between judicial independence, and politics were the dominant views among the judiciary. They were dominant because they were based on direct interpretations of JAL (regarding the prohibition of political participation of the judiciary), but also because there was no need to clash with the executive authority. Even though these laws were aggressive against the legitimacy of the whole legal system, judges felt relieved for not being part of such aggression.¹⁸⁸

The aggression of emergency laws started to decrease with the country's economic expansion. Mubarak's regime took concrete steps to showcase the efficiency of judicial institutions, as well as attract more foreign investment investments. Firstly, it limited resorting to emergency courts, to two

¹⁸⁴ EGYPT CONST. (1971) § 74 states If any danger threatens national unity, the safety of the motherland, or obstructs the constitutional role of the State institutions, the President of the Republic shall take urgent measures against any danger, direct a statement to the people and conduct a referendum on these measures within sixty days of its adoption

¹⁸⁵ *Mostashar Yehia al-Raf'I youwajah Mubarak- motamar al-'adalah 1986*, YouTube (Jun 15, 2012), <https://www.youtube.com/watch?v=ROvFEjZc-dY>

¹⁸⁶ Chancellor Moqbal Shaker was the president of Judges club from the period of 1991- 2002; the Chief judge of Court of Cassation and president of supreme judicial council from the period of July 2006- June 2009; vice president of National Council of Human Rights 2009-2011.

¹⁸⁷ Al-Rajal al-thani Jamal al-Kashki:Moqbal Shaker yarqi al-tafaseal {11:00 :11:45} {Agust 14, 2011) <https://www.youtube.com/watch?v=xcJY10Nh7I>

¹⁸⁸ Between 1992- 2000, Military courts had trialed about 1033 civilian defendants. 92 of them faced death sentences, and 644 were prisoner. See, *Sadiq Reza, Endless Emergency: The Case of Egypt*. 10 NEW CRIM. L. REV. 532 (2007), 541.

types of cases, illegal drug trade across countries, and terrorism.¹⁸⁹ Secondly, the regime adopted more legislative reform to protect its investments.

E. More Clashes with the Judiciary (2000-2005)

1. 2000: The SCC and Judicial Supervision over Elections

The problem of judicial independence rose again after the elections of 1990, even though the dispute was not directly related to independence. The problem raised regarding the interpretation of “supervision over the judiciary body” that is mentioned in article 88, of the 1971 constitution.¹⁹⁰ The government’s opinion was that the article meant that judicial supervision is limited to general committees, and excludes any form of judicial supervision. Both the elections of 1990, and 1995 were under the interpretation of Article 88, resulting in many allegations of fraudulent elections. Candidates, who lost the election, brought forward cases regarding the interpretation of the Article 88.

On July 8th 2000, the Supreme Constitution Court overruled the previous interpretation of Article 88. This judgment was called “a judge for every election box” (*Qadi le-kol Sandowq*). It stated that the right interpretation of Article 88 is full judicial supervision for every general and sub-committee. In one of the most historical judgments in the history of the court, the court involved the judiciary in politics. The court concluded that it is only admissible to appoint the chief of the election sub-committees from the judiciary.¹⁹¹

In November 2000, elections took place under full judicial supervision. The Ministry of Justice appointed its loyal judges in primary elections’ committees. The elections were fair; however, the results were changed to allow government proponents to win. The Judiciary was condemned that they were part of the fraudulent elections’ game. During this election, the judges’ club was not as active as it was during Sadat’s era, or early Mubarak’s era. It did not announce any official statements regarding the fraud of election.

2. 2001: Elections Fraud:

After the SCC ruling, the government found itself obliged to hire a judge for each sub-committee, estimated to be a total of 15,000 judges. The new process did not prevent Mubarak’s regime from continuous election fraud. However, it did not follow the same method of counting-in absent voters. The government started a different approach to election fraud. It was hard to change results of the election especially since judges of the sub-committees refuted fraudulence.

The government resorted to two measures to ensure that its candidates won the elections. Initially, it started to apply stringent rules over judges of the sub-committees. The government did not help judges in the process of transferring polls’ documents from the sub-committee to the primary committee. It also prevented opposing voters from entering the subcommittees to vote, and instigated problems with judges to prevent them from supervising the elections. The Ministry of Justice hired its affiliate judges to take charge of primary committees. When the judges of the sub-committees submitted their reports to the primary committee, it was identified that numbers had been changed to reflect different numbers.

¹⁸⁹ Mostafa Soliman, al-barlaman al-Masry yomdad al-‘amal be-qanown eltawarie lemodat ‘mayn, (May 11, 2011) Alarabia, <http://www.alarabiya.net/articles/2010/05/11/108271.html>

¹⁹⁰ EGYPT CONST. (1971) § 88 states that “the rules of election and referendum shall be determined by law, while the ballot shall be conducted under the supervision of members of a judiciary organ.”

¹⁹¹ SCC, Case no. 11 year 13- {8 July 2000}, The Court states that In case the constitution requires a certain procedure, it is unacceptable to overrule such a procedure for practical considerations, and the law did not require the election to be in one day. Otherwise, constitutional guarantee would become in vain ... The competent article required supervision over the primary electoral committees in all situations to judiciary members. However, it had permitted supervision to sub-committees to people other than them. Since then, polls have been conducted without the supervision of the judiciary.

The judicial response to the election fraud was disastrous. The parliamentary election of 2000 ended in early 2001. The Supreme Judicial Council did not respond to the election fraud claim. Also, the Judge's club, presided over by President Moqbal Shaker, did not respond to such a claim. He believed that what happened was a mere game of politics, in which judges and judiciary will play no part. Anger started to build up among judges. The Judicial Independence Movement JIM started to show up again as defense against the previous election fraud violations. JIM had condemned the government for forcing judges to participate in the election fraud.

3. Judicial Independence Movement (JIM), 2002

In June 2002, the Judges' Club held a board election that was similar to that of 1968. There were two candidates for the Chair position. The first was Chancellor Moqbal Shaker, and the second candidate Chancellor Zakaria Abd al-Aziz.¹⁹² The first candidate was the President of the Club during the election of 2000, and who he did not condemn the government's actions in the elections. There were many allegations that the government supported Chancellor Moqbal Shaker in the election, which he eventually lost.¹⁹³ The second candidate came with the conviction of eliminating abuse of judges. The first candidate did not offer any new approach to the abuse of judges in the election fraud. The second candidate presented himself as the defender of judicial independence, and the judiciary against the executive authority. As a result, the independent movement won the election against the old board that dominated the elections for more than 10 years. They won more than 2/3 of the votes in the elections.¹⁹⁴

4. The Road to the New Conflict: 2003-2005:

These two years had the least conflict; sort of calmness preceding the storm. The government did not engage in any sort of conflict with judges, and the judiciary. It did not perceive any threat from the Judges' Club against its political interests. There was also no legal reform that would extend powers of the Minister of Justice, over the judiciary. The club had no power to either change, or to resist. As for the new board, it was the preparation for the upcoming fight. It was almost certain that fraud would be repeated in the following elections of 2005. The new board was certain that they lacked any real power. It was only the independent judges, who would not accept any violation of their independence. As a result, it was a period of apprehensive anticipation to the 2005 elections.

5. 2005: The Fraud of Election and Judges' Club Position:

I. Election Fraud:

The election process was divided into three stages. The first passed with minimum violations from the government, or its proponents. Problems started to arise in the second stage, when many claims of fraud committed by the chairperson, of the primary electoral committees, were made. Election fraud was triggered by Chancellor Noha al-Zaini's newspaper article. She is the Vice President of the administrative prosecution bureau.

On November 24th, 2005, Chancellor Noha al-Zaini presented her testimony regarding what happened in the elections as a sub-committee chair in Damanhour Governorate.¹⁹⁵ She called the article *Tazwear tahat ishraf al-qada* "election fraud under judicial supervision." In her testimony, she recalls having

¹⁹² Chancellor Zakaria Abd al-Aziz is the president of the Judges club from 2002 to 2007. Unlike Shaker, he did not take any administrative or managerial role.

¹⁹³ Sayed Abdel Hafiyez, *Intkhabat al-qodah almasran: fawz al-mostashar zakaraya abd al-aziz ded morashah al-hokowmah*, Asharq al-Awsat, (22 June 2002)
<http://archive.aawsat.com/details.asp?article=109708&issueno=8608#.VoGAM5Nuk1g>

¹⁹⁴ *Id.*

¹⁹⁵ Noha al-Zaini, *Tazwear tahat ishraf al-qada* (election fraud under judicial supervision), Masry al-Youm {November 25, 2005} <http://today.almazryalyoum.com/article2.aspx?ArticleID=41680> See also,

finished counting the votes, and proceeding to submit her report to the Primary electoral committee. She arrived late, when most of the other judges had submitted their reports. She noticed clear wrongful acts taking place in the Primary committee. She was notified that the committee did not want any of the judges to be present during the Committee's work.¹⁹⁶

Chancellor Al Zaini confirmed that upon her arrival, she noticed that the governmental candidate took less votes, in comparison to the independent candidate, affiliated to the Muslim Brotherhood.¹⁹⁷ She also saw members of the national security conversing with judges responsible for the Primary electoral committee. She was asked to leave the Committee directly after she submitted her report. When she met with other colleagues, she came to know that the independent candidate is the one leading the results. However, when the result was announced, it was in favor of the government candidate. She was confident that there was fraud committed in the Primary Electoral Committee of Damanhour. When she returned to her home, she wrote her testimony declining any responsibility over the election's outcome. She requested that the 160 judges, who were responsible for the sub-committees in the Damanhour governorate, stand up to fraud and prove that the election was fraudulent.¹⁹⁸

II. The Position of Judges' Clubs and Judiciary:

The Club president persisted on fraudulence of the elections, and raised many questions. Firstly, what was the relationship between the Ministry of Interior and the elections process? The Ministry of Interior played a hidden role in assigning judges to certain sub-committees.¹⁹⁹ Secondly, what was the role of the supreme electoral committee in relation to security forces? He requested, in his capacity as elected representative to the judiciary, that judicial supervision over election is whole, not part. He maintained that there should be no interference from the security, or the executive authority in the election process. During this time, the Minister of Justice, who was part of the executive authority, was also the president of the supreme electoral committee.²⁰⁰

On November 25th 2005, the Judges' club formed a fact-finding committee. Members of the committee comprised of: Ahmed Mikky, Hesham Bistawisi, Mahmoud al-Khodiary, and Ashraf al-Barowdi. The committee was to investigate Chancellor al-Zaini's allegations of electoral fraud. The committee did not have any governmental character; rather it was part of the Club's attempt to ascertain incidents of the fraud. The committee members started with contacting the 160 judges, who supervised the sub-committees in the Damanhour governorate. It requested a copy of the reports that they submitted to the primary electoral committee. They were able to secure 137 reports, of the total 160 reports (one report = one judge). The committee found that the governmental candidate received only 8,606 votes; while the other independent candidate obtained 2,4611 votes. The committee confirmed that the government candidate, Mostafa al-Faqi, had lost the elections.²⁰¹

¹⁹⁶ *Id*

¹⁹⁷ The Muslim Brotherhood was a banned group from 1954 till 2011. They did not have any legal rights to run the elections as political party. Its members used to run as independent candidates. Currently, they are banned again after the removal of ex-president Mohamed Morsi in 30 June 2013. See Patrick Kingsley, Muslim Brotherhood banned by Egyptian Court, *The Guardian*, {23rd September 2013}, <http://www.theguardian.com/world/2013/sep/23/muslim-brotherhood-egyptian-court>, See also, Sharon Otterman, Muslim Brotherhood and Egypt's Parliamentary Elections, Council on Foreign Relations {1st December 2005}, <http://www.cfr.org/egypt/muslim-brotherhood-egypts-parliamentary-elections/p9319>

¹⁹⁸ *Supra Note 195*

¹⁹⁹ Tarek Amin, *al-Qodah yadrowsown talab I'fa'ham men ishrاف 'la intkhabat moqbalah*, Masry al-Youm, {3rd December 2005}, <http://today.almazryalyoum.com/article2.aspx?ArticleID=30844>

²⁰⁰ *Id*

²⁰¹ al-Mostashar Ashraf al-Barowdi 'odw lajant taqasi al-haqaiq benadi qodat al-askandarayah: intkhabat damanhour shahadat tajawazat .. we 'la al-qodah a-taharok fawran, Masry al-Youm, {26th November 2005}, <http://today.almazryalyoum.com/article2.aspx?ArticleID=41324&IssueID=525>

On November 26th 2005, the Supreme Electoral Committee excluded Chancellor al-Zaini from the elections. The Supreme Electoral Committee did not duly investigate, as the Club did, the allegations of fraud. Rather, declared that the governmental candidate has won the elections. There was no need to rehire Chancellor al-Zaini again, as there were no elections in Damanhour.²⁰²

On November 28th 2005, three days after the fact-finding committee confirmed the allegation of the fraud, the Supreme Judicial Council issued a controversial response to the fraud allegations. The Council expressed its disapproval of the position of the Judges' Club. It stated "the supreme judicial council regrets that about 10 judges chose to appear on satellite channels, to speak about their colleagues, fraudulence of the elections."²⁰³ The statement did not mention the names of the ten judges. It requested the Attorney General to investigate the incident.²⁰⁴

The fact-finding committee's report proved the authenticity of Chancellor al-Zaini's testimony in the media. The club sent a copy of the fact-finding committee's report to both the Attorney General, and the Minister of Justice, who was also the president of the Supreme Electoral Committee. They did not take any legal action towards the incident. Instead of investigating the fraud allegations, the Attorney General started investigations against the judges who revealed the fraud. As for the Minister of Justice, he transferred the case to the inspection department in the Ministry to punish the judges who discovered the fraud.

On November 29th, the State Council Judges' Club (of administrative court judges), declared its solidarity with the Judges' Club (representing ordinary judges). The administrative judges also faced the same obstacles as the regular judges. Their club had threatened the government that in the case violations against the judiciary were not put to end, the administrative judges would not participate in any future elections. The Club President had a meeting with the Minister of Justice, who ensured that elections will function properly in the future.²⁰⁵

On December 2nd 2005, the third stage of the elections has started. There were many violations committed by the security forces. Even though violations did not reach the level of election fraud, they have negatively affected the elections process. One of the violations committed was preventing the voters from entering many sub-committee affiliated with opposition candidates.²⁰⁶ The security forces surrounded the sub-committees' headquarters. The Ministry of Interior said that it was necessary to secure sub-committees against thugs.²⁰⁷ The rate of violence increased in an unprecedented manner during the elections. There are many allegations that the government was the mastermind of this episode.²⁰⁸

Moreover, violence started to increase against both voters and supporters of candidates. In the third election stage, 2 people were killed, and more than 149 voters were injured. The police forces were not able to prevent that, even though many police officers were injured in the process. As for judges who

²⁰² Tarek Amin, *almostasharah Noha al-Zaini lan tosharak fi intakhabat al-I'dah bedaerat bander damanhour*, Masry al-Youm {26th November 2005}, <http://today.almasyalyoum.com/article2.aspx?ArticleID=41319&IssueID=525>

²⁰³ Tarek Amin, *Majlas al-qada al-a'la yotalab betahqiq m' al-qodah we-yasaf leshtaghal ba'dahmo besaysash*, Masry al-Youm, {28th November 2005}, <http://today.almasyalyoum.com/article2.aspx?ArticleID=39619>

²⁰⁴ It further stated that the attorney general should start immediate investigations with all those who insulted judges and labeled their colleagues with such base descriptions *Id*

²⁰⁵ Tarek Amin and Ali Ibrahim, *Nadi Qodat Majlas al-Dawlah yohadad be-moqata'at al-marhalah al-taltah*, Masry al-Youm, {29th November 2005}, <http://today.almasyalyoum.com/article2.aspx?ArticleID=38805>

²⁰⁶ "al-Man' howa al-hal" *qowat al-amen tohasear lejan al-antkhabat*, Masry al-Youm, {2nd December, 2005} <http://today.almasyalyoum.com/article2.aspx?ArticleID=31032>

²⁰⁷ *Id*

²⁰⁸ *Id*

supervised the elections, while some of them were physically injured, some were not able to deliver their reports in a timely manner due to the riots.²⁰⁹

On December 18th 2005, the President of the Judge's Club (Zarakia Abd al-Aziz) stated his interpretation of juridical prohibition of political participation. He firstly condemned the violations committed during the elections. He refused to involve the judiciary in fraudulent acts committed by the executive authority, and some judges. He further stipulated that there is a difference between talking about, and practicing politics. While the earlier is not prohibited by the Judicial Authority, the latter is. The reason for this is that judges are citizens, who have to enjoy, as individuals, the freedom of expressing their political inclinations.²¹⁰

III. Government's Response

There are two different responses issued by the government. Unlike the rest of the government, the Minister of Justice, Chancellor Mahmood Abu Al-Lail, sided with the Judges' Club.²¹¹ In his meeting with both the representatives of the State Council Judges' Club, and the Judges' Club, he declared that, as the Minister of Justice, and chair of the supreme electoral committee, that he would take all necessary measures to ensure that the election process concludes efficiency, and fairly.²¹²

Chancellor Mahmood Abu Al-Lail was a controversial character. He was part of the Mubarak Regime, and a former judge, governor (1992-1999), and Minister of Justice (2004-2006). He has referred the case of political participation, of Chancellors Ahmed Mekki, and Hisham Bastawisy, to the judicial inspection department.²¹³ He maintained that he was forced by the Mubarak regime to refer both judges to the inspection department. Besides, he had a famous position of supporting judicial independence. He showed major support to transfer the judicial budget from the Ministry of Justice, to the Supreme Judicial Council. This was something that he has previously declared in the Parliament. As a result of the Minister of Justice positions in the first cabinet meeting change. It was hard to have a Minister in the government, who leans towards judicial independence.

This election was catastrophic on all accounts. Initially, 75% of the government-affiliated members failed to secure their seats in the parliament.²¹⁴ Many independent candidates were able to get their seats in the parliament, of which 88 seats were given to the Muslim Brotherhood. It was the highest number of seats Muslims Brotherhood had ever secured in their history, until the 2011.²¹⁵ Governors had to request independent parliamentary candidates, who already won over the government candidates, to join the government party.²¹⁶ One of these members (Taher Hozayan) was a former member of Al-Wafd Party, which is one of the opposition parties. He subsequently quit the Al-Wafd

²⁰⁹ Tarek Amin, *a'tada 'la arb'at qodah fi belqass we abo hamad*, Masry al- Youm, {2nd December 2005} <http://today.almasryalyoum.com/article2.aspx?ArticleID=31041&IssueID=430>

²¹⁰ Tarek Amin, *Zakaria Abd al-Aziz yotlab be-tahyq dawli fi intahakat we-al-khodorie yad'ow le'tsam fi elmahakam*, Masry al-Youm, {18th December 2005}, <http://today.almasryalyoum.com/article2.aspx?ArticleID=24087&IssueID=350>

²¹¹ Tarek Amin, *wazear al-'dl we nadi alqodah: I'lan al-natijah bemokabrat sout, fi al-marhlah al-thalatha*, Masry al-Youm, {29th November 2005}, <http://today.almasryalyoum.com/article2.aspx?ArticleID=38804>

²¹² *Supra note 205*

²¹³ Tarek Amin and Mohamed Bahnassi, *Rahil al-mostashar Mahmoud abu al-lial wazear al-'adl al-lazi atah beh al'tazar lelbastawisi*, Masry al-Youm, {28th September 2011} <http://www.almasryalyoum.com/news/details/114413>

²¹⁴ Mahmoud Salem, *khosaret 75% men nowab al-haliean khalal marhalatian al-owla we althanayah*, Masry al-Youm, {30th November 2005} <http://today.almasryalyoum.com/article2.aspx?ArticleID=37733>

²¹⁵ Mahmoud abu al-Lial, *Misr gar jahazah lelastfta, we idarat almajlas al-'skari lemalaf al-antkhabat satati beaswa men Mubarak, Sharaq al-Awsat*, {9th March 2011}

<http://archive.aawsat.com/details.asp?section=4&issueno=11789&article=611667#.Vog9EZNuk1g>

²¹⁶ Ibrahim Mo'awad, *Na'eba isna yo'lanan indamamhama lelwatani ba'd moqabalat al-mohafaz* Masry al-Youm, {30th November 2005}, <http://today.almasryalyoum.com/article2.aspx?ArticleID=37895&IssueID=488>

party to run the elections as an independent candidate. When he won, he joined the government party.²¹⁷

Additionally, there were many fraud allegations against members of the regime. In an endeavor to remedy this issue, candidates who had fraud allegations, gradually attempted to improve their image in the public eye. Mostafa Al-Faqi, who was the government's candidate in Damanhour, responded to the fraud allegation. He attested that he would resign from the Parliament if the investigations proved the allegations.²¹⁸ However, this investigation did not take place until 2012, after the 2011 Revolution. It was then very difficult to prove, or disregard allegations of fraud, since 7 years had passed of the violation committed. The investigation in 2013, ended as a prima facie case.²¹⁹

F. Defeat of "JIM" 2006- 2010

1. The Loss of JIM in the Club's Elections 2006, and Controversial Policies of the Board:

After the end of the election in 2005, it was impossible for the government to accept Judge's Club Board Members. In 2006, Chancellor Zakaria Abd Al-Aziz lost the election to Chancellor *Al-Zend*. While there is no clear evidence of governmental intervention in the elections, there are some indications that support such a hypothesis. Firstly, the Minister of Justice Mahmoud Abu Alili was replaced with Mamdouh Marei. While the first was known for his bias towards judicial independence, the latter leaned towards the government. Marei took important judicial position, and controversies surrounded him.²²⁰ Secondly, there were informal threats that if members of the JIM won the elections, there would be no privileges or services offered to judges.

The period of *Al-Zend* as President of the Judges' Club has extended over many years, from 2006 to 2015. This period is characterized by two different policies. The first lasted from 2006 to 2012. In this period, Al Zend took the service approach in managing the Club, which means that the Club is only limit to offer services to its members. This policy did not change during this period except one time in 2010. In the second phase, he became the defendant of judicial independence. This phase ran through 2012-2015, after which he was chosen to be the Minister of Justice.

During *Al-Zend* presidency, he carried out the old policy that was adopted by *Moqbal Shaker*. This policy indicated providing multiple services to judges, as well as banned any political participation. He firmly believed that judges are independent, without dealing with independent judiciary as an authority. He announced this policy in one of his interviews in 2010. He stated "President of the Judges' Club practices a job that has no technical aspect. He is a man who offers summer resorts, cars, travel, pilgrimage, books, and medication, whatever is necessary."²²¹

The only exception to the previous policy took place in 2010. In this incident, *Al-Zend* presented himself as the defender of judges and prosecutors' rights. The incident started in Tanta Governorate. Two lawyers wanted to meet the public prosecutor Bassem Abu Rows, who was the Director of the Public Prosecution Office in Tanta City. For unclear reasons, he refused to meet them, and the guards

²¹⁷ *Id*

²¹⁸ Yousef al-'omi, Mostafa al-Faqi: sastaqiel men al-parlaman iza sader hokam bebotlan al-antkhabat, Masry al-youm, {29th November 2005}, <http://today.almasryalyoum.com/article2.aspx?ArticleID=38802>

²¹⁹ Qadi al-tahqiq: la wajah leiqamat al-alda'wah aljanaiyah intakhabat 205 lena'dam al-adlah, Al-Ahram, {17th December 2013}, <http://www.ahram.org.eg/NewsQ/248330.aspx>

²²⁰ He was the president of the Supreme Presidential Elections Committee in 2005, which declared Mubarak as President of Egypt. In the next year, he was appointed as President of the Supreme Constitutional Court. After his retirement, he was appointed as the Minister of Justice in 2006.

²²¹ al-Zend ana sho'lati awafar masayaf we-rahlat haj we-omra, (16/05/2010), YouTube https://www.youtube.com/watch?v=f13j6p0NP_8

of his office insulted the two lawyers. In the lawyers' account of the events, they stated that it was Bassem himself, who insulted them. They proceeded to file a complaint to the district attorney about the Prosecutor's behavior. The District Attorney sent for Bassem to come to his office. While Bassem was on his way to meet the District Attorney, the two lawyers assaulted him physically. The case was investigated and the two lawyers were tried and charged. During the trial, lawyers had protested against the prosecutors and the judiciary not only in Tanta, but lawyers went into a strike across. As a consequence, the two lawyers were sentenced to 5 years imprisonment, and 33 other lawyers were prosecuted for illegal strikes.²²²

Al-Zend took a different approach towards the incident. He made multiple media statements, to express his discontent and that of the Club, and the judiciary towards the incident. He additionally made clear and daring statements that the case between the prosecutor, and the two lawyers will never be settled.²²³ The reasons behind his approach can be divided in two elements. Firstly, elections of the Judges' Club was supposed to take place by the end the year, around the time when the incident took place. It was his opportunity to present himself as the advocate of judges' and prosecutors' rights. During this time, it was the time for the Bar Association elections that coincidentally held in the same time with Judge's Club elections. It was an opportunity for both him and lawyers to present themselves as the protectors. While *Al-Zend* posed as the protector of the judiciary, these lawyers, including *Sameh Ashour* and *Montaser Al-Zayat*, presented themselves as the protectors against the violations of judges and prosecutors against lawyers.²²⁴

The second period (2011-2015) was characterized by judicial independence. *Al-Zend* has changed his convictions drastically. There is major debate on the shift between being a club that offers services to its members, to a club that advocates judicial independence. However, this shift did not happen overnight. It started with the position of the club during 2011 Revolution, during SCAF, until its peak during the Muslim Brotherhood period.

The position of the Club towards the 2011 Revolution was disgraceful. *Al-Zend* decided that he, and his board, will not open the doors of the club to the judges. When the judges tried to access the club, they were prohibited from so doing. The announced reason was that the Club was under construction. However, the real reason is that many of the IJM members went to Tahrir Square to announce their support and solidarity with the people in their legitimate demands. *Al-Zend* and his Board feared that the Club as a platform to officially announce support of the Revolution.

Al-Zend realized that he lost much of his popularity among judges for the shameful position of the Club between February 2011, and June 2012. Even his public meetings with the judges were no longer efficient, since very few judges showed up. Less than a dozen people attended some of these public meetings. The board during this period did not have anything to offer the judiciary as an alternative. The previous policy proved to be inefficient with the increase of demand for judicial reform. As for the IJM members, they started to rise again. It was their time to increase calls for judicial reform. They started to remind people with 2005 elections and the role of judges in exposing the fraud.

Al-Zend started to present himself as the defender of judicial independence according to his understanding. However, he did not define what constituted judicial independence, except for protecting judges' independence. Both *Al-Zend* and the IJM did not have a clear agenda of the

²²² Mohamed Fayed, *Osrat al-mohami al-Mahkowm 'alih fi qadayat I'tada' 'la modier nayabat tanta tonashed al-r'es al-afraj 'nh, Masry al-Youm*, (June 11, 2010), <http://today.almasryalyoum.com/article2.aspx?ArticleID=258548>

²²³ Ta'liq al-mostashaer al-Zend 'al ahdath Tanta (Jun 6, 2010) <https://www.youtube.com/watch?v=PG5Xvjo5FUc>

²²⁴ Montaser al-Zayat declared that he would never accept *al-Zend* as a member in the Bar Association, if *al-Zend* tried to register after his retirement, *see al-Zayat: al-Zend lan yaqayad fi naqabat al-mohakamat Abadan*, (Jun 10, 2010) <https://www.youtube.com/watch?v=oNRkbWhV68s>

necessary reform. The only advantage to the IJM members was their previous stand of the regime. Its members wanted to eliminate any authority of the Ministry of Justice over the judicial budget, and the Judicial Inspection department. The more mistakes the regime committed, the more popular Al Zend became. Gradually, the dozen attendees increased until they reached hundreds, and then thousands. *Al-Zend* presented himself as the defender.

2. Abuse Against judges: 2007-2009

I. Constitutional Reform in 2007, and the Elimination of full Judicial Supervision

Mubarak's regime did not offer any constitutional reform since 1981, unlike all his predecessors. They maintained the idea that the constitution is the contract between the regime and the people. Each president changed the constitution to suit his agenda, except Mubarak. When he came as a president, he maintained the 1971 Constitution; especially since it was reformed in 1980 with two articles that introduced Islamic Sharia' as the source of law, and eliminated the 2 term limit of presidency. Mubarak realized that it was the time to change the constitution. Instead of making a new one, he proposed to amend 34 constitutional articles. In December 2006, Mubarak sent a request to the People's Assembly to change these articles. The proposed articles were mainly to eliminate any form of democratic socialism in the constitutions and to ensure the continuity of his regime.²²⁵

Firstly, the articles that eliminate democratic socialism were articles 1, 4, 5, 12, 30, 33, 37, 56, 59, 73 and 179.²²⁶ Secondly, the articles that were meant to enhance the national and international figures of the Mubarak regime were articles 62, 74, 76, 78, 82, 84, 94, 115, 118, 127, 133, 136, 138, 141, 161, 173, 179, 180, 194, 195.²²⁷ Thirdly, the articles that ensured the continuity of the regime were 76, 88, 136, 138 and 173. Article 76 opened the door for multi candidate presidential elections, instead of referendum on the President of the Republic. Even though this article increased options, it limited the rights to Mubarak himself, or the parties' candidate only.²²⁸ Article 88 was to abolish any resistance

²²⁵ Nathan Brown and Michelle Dan, *al-ta'dalat al-dostorayah al-motherah lejadal fi masr: tahlil nasin*, Carnegie Endowment for international peace.

²²⁶ EGYPT CONST. (1971) § 1 eliminates the socialist democratic system from the constitution. In Article 4, he changed the socialist democratic economic system to replace it with free economic behavior. In Article 5, he prohibited any form of political participation based on religion, race or origin. In Article 12, he removed the socialist education from the education process. In Article 24, he replaced people's right in controlling the national products with the state's right to control it. In Article 30, it defined the public property, as it is the ownership of the state and public domain. In article 33, it illuminated democratic socialism from the property rights. In article 37, it illuminated democratic socialism from agriculture property and legislations. In article 56, it illuminated democratic socialism from syndicates and associates. In article 59, it illuminated democratic socialism rights, and it invented a new article to protect the environment. Article 179 removed the system of socialist prosecutor general, which was responsible for the protecting the socialism system. Article 180 illuminated democratic socialism protection from the aims of the army

²²⁷ EGYPT CONST. (1971) § 62 was amended to ensure a certain electoral norm and enforce a quota of women in the legislative body. Article 74 prevented the president from dissolving the people's assembly during the emergency circumstances. Articles 78, 82, and 84 dealt with the issue of the death or the absence of the president. Article 94 amended the rules related to the death or the absence of any member of the public assembly. Articles 115 and 118 amended the rules related to the draft of general budget. § 127 EGYPT CONST. (1971) changed the impeachment process of the prime Minister. Articles 194 and 195 gave more authority to the upper house *Shura Council*.

²²⁸ EGYPT CONST. (1971) § 76 stated that "The President shall be elected by direct, public, secret ballot. For an applicant to be accepted as a candidate to presidency, he shall be supported by at least 250 elected members of the People's Assembly, the Shura Council and local popular councils on governorate level, provided that those shall include at least 65 members of the People's Assembly, 25 of the Shura Council and ten of every local council in at least 14 governorates. The number of members of the People's Assembly, the Shura Council and local popular councils on governorate level supporting candidature shall be raised in pro-rata to any increase in the number of any of these councils. In all cases, support may not be given to more than one candidate. Procedures related to this process shall be regulated by the law.

Political parties, which have been founded at least five years before the starting date of candidature and have been operating

form the judiciary. Article 136 gave the President the ultimate right to dissolve People's Assembly in cases of emergency. Article 138 eliminated any authority of the Cabinet, and offered full authority to the President. Article 173 replaced the Supreme Judicial Council for both the administrative and regular judiciary.

II. The increase of the retirement age to from 65 to 70:

The increase of the judicial retirement age has passed through two stages. The first was in November 2003, right after the first elections conducted under full judicial supervision.²²⁹ In April 2007, the

uninterruptedly for this period, and whose members have obtained at least 5% of the elected members of both the People's Assembly and the Shura Council, may nominate for presidency a member of their respective upper board, according to their own by-laws, provided he has been a member of such board for at least one consecutive year.

As an exception to the provisions of the fore-mentioned paragraph, any political party may nominate for the first presidential elections, to be conducted following the enactment of this Article, a member of its higher board, established before May 10, 2005 according to its by-law.

Candidature applications shall be submitted to an independent committee, named the Presidential Elections Committee. The committee shall be composed of the head of the Supreme Constitutional Court as a chairman and the head of the Cairo Court of Appeal, the most senior deputy of the head of the Supreme Constitutional Court, the most senior deputy of the head of the Court of Cassation, the most senior deputy of the State Council and five public figures, recognized for impartiality. Three of the fore-mentioned public figures shall be selected by the People's Assembly and the other two by the Shura Council upon a recommendation of the bureaus of both houses for a period of five years.

The law shall determine who will act on behalf of the chairman or any member of the committee, should there be some reason for their absence.

This committee shall exclusively have the following competences:

- 1- To declare the initiation of candidature and supervise procedures for declaring the final list of candidates;
- 2- To generally supervise balloting and vote-counting procedures;
- 3- To announce elections results;
- 4- To decide on all appeals, challenges and all matters related to its competences, including conflict of jurisdiction;
- 5- To draw up by-laws regulating its modus operandi and method of practicing its competences.

The committee's resolutions shall be passed with a majority of at least seven members. Its resolutions shall be final, self-enforcing and incontestable by any means or before any authority whatsoever.

Its resolutions may not be challenged through construing or stay of execution. The law regulating presidential elections shall determine other competences for the committee.

The law shall also determine regulating rules governing the nomination of a candidate to replace another one who has vacated his seat for some reasons other than assignment within the period between the starting date of candidature and before the termination of voting. Voting shall be conducted in one single day. The presidential elections committee shall establish committees to administer stages of the voting and ballot-counting process. The committee shall establish main committees to be composed of members of the judiciary to supervise the process in accordance with such rules and regulations as may be decided by the committee.

Election of the president shall be declared when candidates have obtained an absolute majority of the number of valid votes. In the event that none of the candidates has obtained such majority, election shall be repeated, at least after seven days, between the two candidates who have obtained the largest number of votes. Should another candidate obtain a number of valid votes equal to those of the second, he shall take part in the re-election. In this case, the candidate who has obtained the largest number of votes will be declared winner.

Voting for electing the president shall be effected, even though one single candidate has applied or even if he was the only candidate remaining due to assignment of the rest of candidates or due to failure to field another candidate in lieu of the one vacating his seat.

In this case, the candidate who has obtained the absolute majority of the number of valid votes shall be declared winner. The law shall regulate procedures to be followed in the event the candidate has failed to obtain this majority.

The President shall submit the draft law regulating the presidential elections to the Supreme Constitutional Court following endorsement by the People's Assembly and before promulgation, to determine compliance with the Constitution.

The Court shall return its ruling in this connection within fifteen days from date of submission thereto. Should the court decide that one or more provisions of the draft law are unconstitutional; the President shall return it to the People's Assembly to put this ruling into effect. In all cases, the court's ruling shall be binding to all parties and all state authorities.

The law shall be published in the official gazette within three days from date of issuance. “

²²⁹ Al-barlamm almasri ya'lan alyoum mowafaqatah 'la raf' san al-taqa'ed eleqodah ela 68 'aman, Sharq al-awsat (23 29 November 2003), <http://archive.aawsat.com/details.asp?article=205272&issueno=9132#.VoHRB5Nuk1g>

second step of the executive abuse towards the judiciary was to increase the age of retirement from 68 to 70.²³⁰ There was even talk of increasing the age to 72. However, this plan did not materialize. It was planned to materialize after the 2010 elections. This did not take place because of the 2011 Revolution. It suspended all plans set by the Mubarak regime.

The previous increases aimed to achieve two main goals. Firstly, it aimed to ensure continuation of the affiliated judges, in elite positions for longer periods. After clashes erupted with the judges in 2005/2006, Mubarak's regime was preparing to introduce constitutional amendments, to eliminate any form of judicial supervision. It aimed to maintain its allies inside the judiciary to be able to pass such an amendment. Secondly, it aimed to stop the succession of certain judges towards elite positions in the judiciary. The more the age of retirement was raised, the better opportunity for older judges to stay in office. They are the ones who would be less resistant of the executive authority. This would be true if we know that the average age of the JIM members was around 50-55 years old.

Such a change in the retirement age, was faced with huge opposition from the judges. Even though it was passed as an amendment to JAL, the supreme judicial council endorsed the increase. On the other hand, the Judges' Club declared that it was a violation of legitimacy. Opponents of the law, who constituted the majority of judges, refused such an increase in whole and part. Judges threatened to escalate their dissatisfaction; however, no action was taken. Their fight over the election fraud, with the executive authority over the previous years, has led to a weakened bloc. As a consequence, the law was passed, since the SJC endorsed it, which is the first beneficiary of that law.²³¹

III. Raising the bar in the appointment requirements, 2007

A call for reform of the appointment rules of prosecutors was issued in the same year. The call for reform was not merely to ensure equality among the candidates. Rather it was made to hinder any unjustified appointment of judges' children in the judiciary. Since the establishment of the modern Judiciary, overall grades were never set as a basic condition of appointment. Earlier, there was no need to announce such a requirement, due to the small number of law graduates.

Before 2007, the appointment process of new prosecutors was done over two phases. The first was called "*Dof'ah Assasayah*" or the Main appointment batch. It was around two thirds of the total number of appointees, who were chosen based on merit. From the Supreme Judicial Council viewpoint, these merits were the overall grade, security clearance, and family preferences. The second phase was called "*Dof'ah takmaliyah*" or supplementary appointment batch. According to JAL, this batch was about one third of the appointees, dedicated to graduates who did not score very high, and those who had been working as lawyers for two years. The majority of the appointees in this phase were the sons, and sometimes relatives of the judges.

In 2007, the executive authority proposed a new reform to appointment conditions. The reform was to set the requirement of an overall grade of "good" instead of "pass" in order to apply for prosecution appointment. Enforcement of the law had an immediate effect. It was applied to the graduates of 2006, who had applied based on the previous rules. As a consequence, graduates of the *Dof'ah takmaliyah*, or the supplementary appointment batch, could not be appointed until the present day.

There are two different justifications for the previous reform. Firstly, the reform aims to ensure equality and eradicating corruption, which used to occur during *Dof'ah takmaliyah* or supplementary appointment batch. It is unfair to dedicate one third of the appointees, around 150 appointees, out of nepotism and favoritism. Secondly, judges regarded such reform as a fight against them. In 2008 and

²³⁰ Jam'ayah tar'eh leqodah misr gadan ihtjajan 'al raf' alsan al-ma'ash, (28 April 2007) <http://www.albayan.ae/one-world/1177248187046-2007-04-28-1.167404>

²³¹ *Id*

2009, less than a dozen of judges' sons were able to join the judiciary. Judges viewed such a reform as a form of abuse. This was reform to prevent *Do'ah takmaliyah* from joining the judiciary, and limit any privilege to judges in the institute.²³²

V. Supreme Council of Armed Forces' Era (2011-2012)

A. The success of the Revolution and the ousting of Mubarak

After the 18 days in Tahrir Square, the Revolution succeeded in ousting Mubarak from office. This transition period was marked by the absence of a clear plan, and a leader. The first decision, however, was to articulate the new constitution, and hold trials for Mubarak, and his aides. In order to draw the road map, SCAF proposed a constitutional referendum to gain legitimacy of military intervention in the Revolution.

The constitutional declaration contained 63 articles that drew the roadmap for the transition period, in March 2011.²³³ The judicial role in the constitutional process, and the declaration itself was limited to ensuring full judicial supervision over the elections. This is the same principle that the SCC maintained previously in 2000. During this period, no calls were made to eliminate the judiciary from the political arena, as a grantee for fair elections.²³⁴

The Army was satisfied with the ordinary judiciary and its prosecution, and trials of figures of the previous regime. However, the trials failed to achieve justice, and attain the truth. Firstly, trials failed to touch on prominent figures of the past regime, for crimes committed against humanity since 2002. Crimes included killing and torture of Egyptian political opponents over the years. Since the actualization of the ICC convention in 2002, the landmarks of the previous ruling figures have not been prosecuted thus far. Secondly, trials were conducted on the basis of the atrocities that the regime committed during the eighteen days of the Revolution.

The judiciary failed to identify the collective responsibility of the Mubarak regime. Two specialized courts handled the prosecution of Mubarak and his assistants: the felony court and the court of cassation. Within the felony court, all convicted individuals have been acquitted of the crimes they were accused of. Only Hosni Mubarak and the previous Minister of Interior, Habib El Adly, were convicted of killing. The court based its verdict on the fact that Mubarak and Habib El Adly's actions were not pre-meditated, "despite knowing for sure the proceedings of the events, and the interventions of criminal elements amount the protestors."²³⁵

The Court of Cassation challenged the previous finding of the felony court, and built its argument on the fact that the previously mentioned basis are not recognized in the Egyptian criminal law. It also stated that it is not sufficient to declare the criminal responsibility of Mubarak and Adly for murdering

²³² Ahmed Sawi, *I'tazar rasmi lefarouk Jawadah*, Masry al-Youm, {11th December 2006}, <http://today.almasryalyoum.com/article2.aspx?ArticleID=40524>,

²³³ To read the Constitutional Declaration articles in English, <http://www.egypt.gov.eg/english/laws/constitution/>

²³⁴ In 2014 Constitution, it formulates a permanent National Elections Commissions that is composed from judicial members. EGYPT CONST. (2014) § 209 states that the commission consists of "10 members selected equally from among the vice-presidents of the Court of Cassation, the presidents of the Courts of Appeal, the vice-president of the State Council, the State Affairs and Administrative Prosecution, who are to be selected by the Supreme Judicial Council and special councils of the aforementioned judicial bodies." As for the president of the Commission, it would be the president of the court of cassation. As for the sub-committees members, EGYPT CONST. (2014) § 210 mandates that "voting and counting of votes in referenda and elections run by the Commission is administered by its affiliated members under the overall supervision of the Board. It may use the help of members of judicial bodies." Besides, the constitution maintains the role of the judiciary in supervising the election until 2024. Article 210/2 states that "the voting and counting of votes in elections and referenda in the 10 years following the date on which this Constitution comes to effect are to be overseen by members of judicial bodies and entities in the manner set out in the law."

²³⁵ Case no. 3642/2011 Felony- El Menya District and 1227/2011 Felony- Kasr El Nile

peaceful protestors.²³⁶ Hence, the Court decided to accept Mubarak and Adly's appeals, and returned the case for pleading to the felony court. Trials on politics, law and societies were meant for social justice, which cannot exist without punishing offenders of the previous regime. This research is about the fairness of trials.²³⁷

B. The role of judiciary in the political arena and supervising elections

The Egyptian Judiciary played an important role after the end of Mubarak's regime. After 29 years in power, ex-president Hosni Mubarak resigned from his position. The country faced many difficult questions concerning executive and legislative authorities.²³⁸ Judicial independence was spared from the collapse that the two other authorities faced after the Revolution. Without independence, the judicial authority would not be able to sustain its status after the 2011 Revolution. The old figures of the judiciary, like Ahmed Mikky, Zakrai Abd Al-Aziz and Bastawisi strongly resurfaced.

The first call for election reform happened with the return of full Judicial supervision of elections.²³⁹ People agreed that the elections should not be in the hands of the executive authority, due to the previous history of election fraud. The reform of electoral supervision went over several stages. Firstly, it started with judicial supervision to subcommittees. They applied the Supreme Constitutional Court ruling of "one box, one judge." Secondly, the reform gave the president of Cairo Court of Appeal the position of President of the Supreme Electoral Committee. This job is given based on seniority of the judges. The most senior judge is the chief of the court. This would prevent the executive authority from playing any role in choosing the president of the Supreme Electoral Committee.

Additionally, more reform was introduced prior to parliamentary elections. It allowed candidates the right to obtain a copy of the subcommittees' report. Previously, the sub-committee chairs would submit their reports to the primary Electoral Committee, which in turn submits its final report to the Supreme Electoral Committee. The new reform mandated that chairs of subcommittees must submit a copy of the report to the candidates. The aim of such reform was to ensure the elimination of fraudulent acts by the Supreme Electoral Committee, or the primary Electoral Committees. Hence, the elections that occurred during the period of 2001-2013 were fair. Otherwise, candidates will be able to publish the subcommittees' reports to prove fraudulence.

VI. Mohammed Morsi's Era (2012-2013)

A. Beginning of the Conflict:

After long and continuous domination of the Army over politics in Egypt (since the Pharaohs), the Egyptian Revolution of 2011 managed to bring the first civil President to power. The new President promised to bring justice and retribution, as well as achieve aims of the Revolution. The slogan of the Revolution was "Bread, Freedom and Social Justice."²⁴⁰ However, these three aims were not attained

²³⁶ Court of Cassation -Appeal no. 5334/82 Judicial year- Public Prosecution Bureau vs. Mohamed Hossni Mubark and others

²³⁷ Unlike what happened at the end of World War I, a commission, set up by the Allied Forces, recommended that since defeated powers have violated conventions of war, high officials should be prosecuted for ordering such crimes and on the basis of command responsibility. It was also suggested that an Allied High Tribunal be established to prosecute violations of laws and customs of war and the laws of humanity. After World War II, two ad-hoc tribunals were set up. The first was the International Military Tribunal at Nuremberg (IMT), and the second was the International Military Tribunal for Far East (IMTFE). As a result, retribution and continuous chaos would not be an option.

²³⁸ *Supra note 40*, at 245

²³⁹ Egypt" 2011-2012 Supreme Judicial Commission for Elections, African Democracy Encyclopedia Project, January 2012, <https://eisa.org.za/wep/egy3a.htm>

²⁴⁰ Randa Ali, Egypt's Revolution Continues: One Chant at a Time, *Ahram online English*, {January 23, 2012}, <http://english.ahram.org.eg/NewsContent/1/114/32335/Egypt/-January-Revolution-continues/Egypt-Revolution-continues-One-Chant-at-a-Time.aspx>

without any retribution from those responsible for previous injustice. After 2 years of the Revolution, the people did not feel any change in the justice system that could lead to accountability of the regime. Both the legitimacy, and justice struggled to prove their existence after the former regime. The only legitimate remedy for such atrocities was the formulation of ad-hoc tribunals, or commissions that would prosecute and investigate violations of the laws.

The Muslim Brotherhood (MB) went into conflict against the three judicial bodies. These bodies are the ordinary judiciary, the administrative judiciary and the constitutional court. It is very hard to decide whether these fights were because of legal reasons, or for settling old accounts. Even though these battles were a response to a legal action taken by courts, the MB members were part of any legal committee formulating new laws.²⁴¹ The first conflict took place right after the end of parliamentary elections. In February 2012, after much criticism by members of the People's Assembly, Chancellor Al- Ghariani, the Chief of the Supreme Judicial Council, and ex-President of the court of Cassation at that time, sent an official letter requesting the MB to respect the separation of power.²⁴² Such warning came a few months after swearing in of the legislative body, where Islamic parties won the majority of votes.²⁴³ Two months later, the Supreme Administrative Court suspended the constitute assembly. The court maintained that "there is an apparent conflict of interest: that members of Parliament do not have the authority to participate in a panel that will draft a constitution defining the powers of the legislative branch."²⁴⁴

There was an ongoing conflict, between the Judiciary and the regime at the time, which was based on legal and political issues. The legal dimension of the conflict is based on two issues. The first was the constitutional declaration, of August 2012, which was the core of the conflict. The second issue was the cases pending in front of the Supreme Constitutional Court, regarding the legitimacy of both Houses and the Constitute Assembly. As for the political nature of the conflict, both the regime and the judiciary escalated the conflict. The judiciary called for the solidarity against illegitimate elimination of the Attorney General. They also suspended all the judicial work in courts and public prosecution, and threatened not to supervise the elections. These major factors were based on judges' understanding of their role as protector of both the political life, and legal elites.

B. The legal foundation of the conflict between MB and Judiciary

Since the Monarchy, successive regimes banned the Muslim Brotherhood from practicing politics, which forced them to practice stealthily. There are two factors that resulted from the undercover political participation. Firstly, MB was able to establish strong connections across the country, which made them the only politically prepared group, to compete over any election. Secondly, MB did not have efficient legal advisors. Their lawyers who were inadequately prepared and failed to offer adequate legal advice, were part of the problem, rather than the solution.

After the Revolution, it was necessary that the Supreme Council of the Armed Forces (SCAF) issue constitutional declarations to maintain the constitutional environment. The last, was the Supplementary

²⁴¹ Nouran el-Behairy, Timeline of Morsi and the Judiciary One year in Power: The Independent, {June 29, 2013}, <http://www.dailynewsegypt.com/2013/06/29/timeline-of-morsi-and-the-judiciary-one-year-in-power/>

²⁴² Issam Saliba, Egypt: Judicial Authority warns parliament, library of congress, 17 February 2012, www.loc.gov/lawweb/servlet/lloc_news?disp3_I205402993_text

²⁴³ Egypt's Islamist Parties win elections to Parliament, Middle East, BBC News, (21 January 2012), <http://www.bbc.com/news/world-middle-east-16665748>

²⁴⁴ Judgment is mentioned in George Sadek, Egypt: Administrative Judicial Court Suspends the Constitutional Panel, Library of Congress (16 April 2012), <http://www.loc.gov/law/foreign-news/article/egypt-administrative-judicial-court-suspends-the-constitutional-panel/>

Constitutional Declaration (SCD) issued on June 16th 2012.²⁴⁵ SCAF based its SCD on the Constitutional Declaration. It was considered a new addendum to the March 30th 2011 Constitutional Declaration.²⁴⁶ The aims of the declaration were many, among which: to limit the authority of the President in appointing the Minister of Defense,²⁴⁷ declare war,²⁴⁸ return the legislative power to the SCAF in case of dissolving the parliament,²⁴⁹ the right to deploy military personal in civilian areas,²⁵⁰ as well as the right to establish a new constitutional assembly.²⁵¹

Unlike SCAF, the President did not have the right to issue Constitutional declaration. On August 15th, 2012, ex-President Mohamed Morsi issued a unilateral constitutional declaration without the putting it to public referendum.²⁵² He used the absence of legislative bodies after the dissolve of SCC of its elections.²⁵³ The declaration contained 7 articles, and was met with criticism, which was the reason behind the uprising of judiciary bodies against him. They considered it as an assault on the judiciary.²⁵⁴ Four articles out of the main six articles are related to the judicial authority, either directly or indirectly.

Article one dealt with an enormous number of acquittals of members of Mubarak's regime.²⁵⁵ However, this article was considered a violation of the *res Judicata* rule. Every political party agreed to the prosecution of members of the Mubarak regime, as well as Mubarak himself. Prosecution was going to be in front of the Egyptian judiciary, and according to Egyptian criminal law. Even some political figures like Amr Moussa, former Secretary-General of the League of Arab States- considered such trials as victory to justice.²⁵⁶ Article 2 gave legal immunity to the President's decisions.²⁵⁷

C. The Conflict with SCC

The conflict with the Supreme Constitutional Court, and the MB was based on four factors. They are dissolving the Public Assembly, permitting Mubarak's aides to run for elections, dissolving the *Shura* Council (lower house), and dissolving the Constitute Assembly. The time frame of these four cases was one year, between June 2012 and July 2013. The Supreme Constitutional Court ruled on the first two

²⁴⁵ George Sadek, Egypt Supreme Council of Armed Forces issues a New Supplementary constitutional Declaration, Library of Congress, (25 June 2012) <http://www.loc.gov/law/foreign-news/article/egypt-supreme-council-of-armed-forces-issues-a-new-supplementary-constitutional-declaration/>

²⁴⁶ English text of SCAF amended Egypt Constitutional Declaration, Ahram Online (18 Jun. 2012) <http://english.ahram.org.eg/NewsContent/1/64/45350/Egypt/Politics-/English-text-of-SCAF-amended-Egypt-Constitutional-.aspx>

²⁴⁷ SCD § 53

²⁴⁸ SCD § 53/1

²⁴⁹ SCD § 53/2

²⁵⁰ SCD § 56

²⁵¹ SCD § 60 B

²⁵² George Sadek, *Egypt: President Issues New Constitutional Declaration*, Library of Congress (15 August 2012), www.loc.gov/lawweb/servlet/lloc_news?disp3_l205403282_text

²⁵³ *Id*

²⁵⁴ Muslim Brotherhood assault on the Judiciary System in Egypt, CNN (16 August, 2012) <http://ireport.cnn.com/docs/DOC-829852>

²⁵⁵ EGYPT CONST. DECL. (2012) § 1 states that Reopen the investigations and prosecutions in the cases of the murder, the attempted murder and the wounding of protesters as well as the crimes of terror committed against the revolutionaries by anyone who held a political or executive position under the former regime, according to the Law of the Protection of the Revolution and other laws.

²⁵⁶ Amr Moussa Interview: Mubarak trail and his sons in front of natural judges achieves justice (20 April 2011) <http://www.youm7.com/story/0000/0/0/-/395452#.VmRB6uOhc1g>

²⁵⁷ EGYPT CONST. DECL. (2012) § 2 states that “previous constitutional declarations, laws, and decrees made by the president since he took office on 30 June 2012, until the constitution is approved and a new People’s Assembly [lower house of parliament] is elected, are final and binding and cannot be appealed by any way or to any entity.” It further stipulated that “nor shall they be suspended or canceled and all lawsuits related to them and brought before any judicial body against these decisions are annulled

cases, in June 2012, while it ruled in the other two cases in July 2013. So, there are three stages in the conflict.

The first stage is the position of the Supreme Constitutional Court regarding the first two cases. Firstly, the Supreme Constitutional Court had dissolved the public assembly of 2011- 2012. In this Public Assembly, the MB managed to gain more than 45% of total seats in the PA, while the Islamic party got the majority with 70% of total seats.²⁵⁸ The law regulating the elections made a clear discrimination between party candidates, and independent candidates. The candidate with political affiliation may run on both the list system and individual system, while the independent candidate may run only on the individual system. According to the election law number 123 for year 2011, the list system candidate may run for two-thirds of the seats of the PA. As for the individual candidate, he/she may only run for one third of it.²⁵⁹ This discrimination leads to many disputes.

The SCC ruled that the law was unconstitutional. The origin of the dispute started with a claim from unsuccessful candidates in Qalyubiyah and Qena governorates. The candidates claimed that Article 1 of the election laws was unconstitutional. The candidates based their claim on the inequality between the political parties' candidates and independent candidates in the PA elections.²⁶⁰ The SCC found that such discrimination violates article 7 of the constitutional declaration.²⁶¹ The court maintained that the law permits unprecedented discrimination against citizens who choose to run for election as individuals, against those who are affiliated with political parties. As a result, the court found the whole election process illegal, and it dissolved the People's Assembly.²⁶²

Secondly, there were many demands to ban Mubarak's regime from continuing in the political arena after the success of the 2011 Revolution, and for 10 years. The reason behind such law was the corruption of election over the previous 30 years to the Revolution. As a consequence, Air Marshall Ahmed Shafik was banned from running for presidency.²⁶³ Consequently, Shafik contested the law, until the case reached the Supreme Constitutional Court.

The Supreme Constitutional Court ruled for the unconstitutionality of elections', banning Mubarak's aides from participation in the political life. The Court found that the law violated the principle of non-retroactivity of sanctions. The Court considered that to prevent a certain category of people from

²⁵⁸ Profile: Egypt's Muslim Brotherhood, BBC, Middle East, {25 December 2013}, <http://www.bbc.com/news/world-middle-east-12313405> See also, *Gamal Essam al-Din*, Dissolution of People's Assembly deals blow to Egypt's Brotherhood, Ahram English, {July 15, 2012}, <http://english.ahram.org.eg/NewsContent/1/64/45012/Egypt/Politics-/Dissolution-of-Peoples-Assembly-deals-blow-to-Egypt.aspx>

²⁵⁹ LAW NO. 120 (2011) § 3

²⁶⁰ Supreme Constitutional Court, Case 20, year 34, {June 14, 2012}, Egypt.

²⁶¹ EGYPT CONST. DECL. (2011) § 7 stipulates that "Law applies equally to all citizens, who are equal in rights and general duties. They may not be discriminated against due to race, origin, language, religion, or creed."

²⁶² The Supreme Constitutional Court precedent goes for not interfering with the political disputes. However, in this case, the SCC considered that such dispute is non-political dispute. It stated that "the court has maintained the precedent to exclude all the political disputes from the jurisdiction of the judicial supervision of this court. The reason is that such disputes cannot be subject to lawsuits. The basis to determine whether a dispute is political or not, is the nature of the dispute not the definition that the legislator gives. This occurs as long as the description that the legislators give to a certain actions is contrary to the nature of the dispute. Besides, the protection of the state or its sovereignty – nationally and internationally- requires limited judicial supervision over political issues... Hence, it is only up to the Supreme Constitutional Court to determine the nature of the dispute whether it is political dispute, which would be excluded from the Court jurisdiction, or would it fall under the court jurisdiction, which the court would deal with. (*Id*).

²⁶³ Air Marshall Ahmed Shafik was the Minister of Civil Aviation and the Prime Minister during Mubarak. He run the first presidential elections after the 25th Revolution against ex-president Mohamed Morsi. There is still pending corruption cases against Air Marshall Ahmed Shafik. See in that regard, Prosecution to review Ahmed Shafiq's land corruption case, Ahram Online, {December 19, 2013}, <http://english.ahram.org.eg/NewsContent/1/0/89537/Egypt/0/Prosecution-to-review-Ahmed-Shafiqs-land-corruptio.aspx>

political participation is a sanction that cannot be imposed by legislation.²⁶⁴ Besides, the court asserted that the formulation lacked an important legal characteristic, which is generality and impartiality. The law was formulated to ban certain citizens from this right, only for their connection with a previous political party. This violates the constitutional right of article 7 of the constitutional declaration.²⁶⁵

The second stage reflected the response of MB to SCC judgments. The first two cases confirmed the conviction that the Supreme Constitutional Court not only supports the return of Mubarak Regime to political life, but also delivers a message to MB that they were not welcome by the judiciary. MB was not able to accept the idea of losing their legal fight against the SCC. Instead of accepting the path of democracy, they reverted to a different path based on their popularity.

They sent their supporters to blockade the SCC building; the aim of which was to achieve three issues. Initially, to obstruct the SCC from entering the Court to rule in the other two cases. It was clear that SCC would dissolve both the constitute assembly, and the Shura Council based on its previous judgments. There was a core violation in the election law that was generalized in all laws of these assemblies.

Besides, the blockade would give the Constitute Assembly more time to finish writing the Constitution of 2012. The Constitute Assembly was able to call a public referendum on reform of the Constitution. Even though there was much opposition towards such referendum, Ex-President Mohamed Morsi called on the people to vote in favor of the new Constitution.²⁶⁶ The results of the constitution referendum showed 64.01% voters who agreed, against 35.99% who disapproved the new constitution.²⁶⁷ This result was unprecedented in modern Egyptian history.²⁶⁸ It gave an indication to the MB that their popularity started to decline against unknown political forces, which MB like to call *Foolool* or supporters of Mubarak's regime. This brought about uncertainty regarding what the new election would bring to the political arena.

The third stage was at the end of MB era. The blockage was over, and judges were able to access the court once again. The first two judgments of the Supreme Constitutional Court were the annulment of the Shura Council and the Constitute Assembly. The court further stipulated that these judgments were late. If it were to release its judgment earlier, the Constitute Assembly would be dissolved. The President, as well, would not be able to call people for Referendum. The court asserted that even though all this legal action was illegitimate, it still had valid consequences.²⁶⁹

D. The political Nature of the conflict between MB and the Judiciary

Reform of the Judicial Authority law started after the appointment of Chancellor Ahmed Mikky as Minister of Justice, and the appointment of his brother Chancellor Mahmoud Mikky as Vice President of Ex-President Mohamed Morsi. All the reform attempts failed for several reasons. Firstly, there were strong proponents to the Mikky Brothers. The leader of this opposition was the president of the Judges' Club Ahmed al-Zend. He kept proposing another law instead of their law, which was called the Club

²⁶⁴ Supreme Constitutional Court, Case 57, year 34, {June 14, 2012}, Egypt

²⁶⁵ EGYPT CONST. DECL. (2011) § 7

²⁶⁶ A Dubious Yes, Flawed Constitution will be endorsed but the argument is far from over, *The Economist*, {December 22, 2012}, <http://www.economist.com/news/middle-east-and-africa/21568756-flawed-constitution-will-be-endorsed-argument-far-over>

²⁶⁷ Ahmed Feteha, Full unofficial results of Egypt's Constitution referendum: A Visual Breakdown, *Ahram English*, {December 23, 2012}, <http://english.ahram.org.eg/NewsContent/1/64/61119/Egypt/Politics-/Full-unofficial-results-of-Egypt-constitution-ref.aspx>

²⁶⁸ It is notable that this was the first time the Egyptian people would say no to a referendum with such high percentage. In 2014 constitution referendum, it was passed with percentage of 98%. *See* Egypt' New Constitution gets 98% yes vote, *The Guardian*, <http://www.theguardian.com/world/2014/jan/18/egypt-constitution-yes-vote-mohamed-morsi>

²⁶⁹ Supreme Constitutional Court, Case 112, year 34, {July 2, 2013}, Egypt

Project. Both of the two projects have their merits. However, there was a lack of honest desire to change the law, since that change would affect the best interests of many influential judges.

Moreover, the tension between the parliament and the judiciary started to escalate during this period. Mubarak's trials were the beginning of the tension. The MB wanted the court to execute Mubarak and his Ministers for their offenses. However, the court ruled in favor of his Ministers and Mubarak got life sentence. Members of the parliament started to criticize the judiciary for their ruling. They even started to move for "purification of the judiciary." Judges felt that MB members were trying to topple them. Judges started to argue that without them, MB would never enter the parliament, or be out of jail during Mubarak's era. Hence, the tension started to increase.

The Supreme Constitutional Court announced its rejection of the proposed status of the court in the constitution in October, 2012. This rejection included all draft articles regarding the status of the court.²⁷⁰ The President of the court Maher Beheiri stated "this is a reverse move, and a stark violation of the Court's authority, and diminution of its competencies."²⁷¹ He considered that such proposed articles are considered as a layback of the judicial independence, which the SCC would never accept.²⁷² This statement is one of few unique official statements, where the court announced its rejection of government political actions. It was a reflection of a general feeling among the court judges that the Muslim Brotherhood would seek revenge of the court's members.²⁷³

VII. Conclusion

The Egyptian Judiciary has struggled against the executive authority for decades.²⁷⁴ This struggle was subject to many losses and gains. It paved the road for the judiciary to have a role in the constitutional process in the past 5 years. This research argues that the Egyptian judiciary was based on two pillars that affect the constitutional building process after the 2011 Revolution. These two pillars are: the role of the Judiciary as the protector of politics (judicial supervision over elections), and the role of judiciary and the legal elites that monopolize the legal process.

²⁷⁰ Egypt Court rejects constitutional draft articles spelling out its power, Ahrām online (16 Oct. 2012)

<http://english.ahram.org.eg/NewsContent/1/64/55730/Egypt/Politics-/Egypt-court-rejects-constitutional-draft-articles-.aspx>

²⁷¹ Issam Saliba, Egypt: Constitutional Court Objects to its status in New Draft Constitution, (11 January 2012)

<http://www.loc.gov/law/foreign-news/article/egypt-constitutional-court-objects-to-its-status-in-new-draft-constitution/>

²⁷² *Id*

²⁷³ *Id*

²⁷⁴ Tamir Mustafe, the Struggle for Constitutional Power, law, politics and Economic Development in Egypt, {2007}, 10-20. Maher Sami, Vice President of the SCC, states that "it was clear from the first day, when the constitutional assembly started its work, that some people within and outside were seeking to settle old scores and take revenge against the court."

Chapter Two:
The Demand for Judicial Reform in Egypt

Outline

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I. Introduction

There is often a large gap between legal protection of constitutional rights and successive political/regime practices. The judiciary fails to bridge the gap between *de facto* and *de jure*. This breach of social right is reflected in major issues like freedoms, transparency and property protection. Failure of the judiciary to face such discrepancies results in wrong interpretation of judicial independence and accountability. It is a direct result of insufficient legal education offered to judges and prosecutors. This section is limited to establishing the relationship between social problems and the judiciary, while the later chapters propose a solution to judicial problems, in light of the social needs. This chapter argues that the call for reform shall be revived again to face the contemporary challenges.

Problems facing the judiciary mandate reform. Challenges are both internal as well as external. The scope of this chapter lies in the contemporary problems that the judiciary faces. This chapter will address internal problems, and responds to major social problems. It will not propose any solutions; it will only highlight the various challenges of the judiciary to face many problems. This chapter argues that judicial reform is a demand to face contemporary issues that are a result of several political instabilities.

This chapter aims to achieve two major targets; the first is to establish the cause for reform. Judiciary reform is the answer to face the challenges in society. It aims to highlight the fact that failure of the judiciary to respond to major problems was the main reason behind corruption. The second target is for reform to function as a platform for solutions. The whole dissertation aims to propose solutions for the contemporary judicial problems.

This chapter offers four major reasons for reform, which are social, economic, political and legal. Firstly, the social aspect is represented in protection of freedoms. The section compares between the legal rights mentioned in the constitutions and the judicial practices, either in courts or the prosecution. In regards to the issue of freedom, there are three major freedoms that successive constitutions continue to ensure, where the judiciary functions contrary to the constitution. Freedom includes freedom of expression, assembly and religion. Transparency issues are measured against the judiciary, according to 2014 Constitution provisional articles. This part not only tries to avoid the controversial definitions of transparency, but also highlights legal violations from the judiciary regarding the constitutional rights. In this regard, transparency includes data availability, economic transparency and fighting corruption. As for the property rights, this research shows how the judiciary still adopts interpretations that lead to instability to ownership.

Secondly, there are two sides to economic issue; the first is wasted resources, while the second is gained resources. The chapter would not deal with the gained resources, since wasted resources are the major problem. The President of the Central Auditory organization states that the cost of corruption in Egypt in the last few years is 600 Billion Egyptian Pounds.²⁷⁵ This statement puts a lot of questions of the role of the judiciary in fighting corruption. Thirdly, the ambivalence of the judicial role in political life shall also be addressed. There are two contradictory issues. The first is the legal ban on judges to participate in political action, while they are propagated to be protectors of public political will.²⁷⁶ The gap between the two issues is addressed in this section without adopting or suggesting a solution, as it would be proposed in the later chapters. Fourthly, the legal reasons are presented in the role of the

²⁷⁵ Egypt's Corruption losses exceed \$76.6 billion, Middle East monitor, {December 15, 2015}
<https://www.middleeastmonitor.com/news/africa/22837-egypts-corruption-losses-exceed-766bn>

²⁷⁶ The problem of the judicial review to the political decision is addressed in the NATAHAN BROWN, CONSTITUTIONS IN A NON-CONSTITUTIONAL WORLD, ARAB BASIC LAWS AND THE PROSPECTS FOR ACCOUNTABLE GOVERNMENT, {2002}, 143-146.

judiciary -to increase notion of the inequality before the law – as well as the lack of inefficient legal education to its members.

II. Social Reasons for Reform

A) Inefficient Protection of Freedom:

The constitution grants freedom of assembly. Article 73 of the 2014 Constitution states that “citizens have the right to organize public meetings, marches, demonstrations and all forms of peaceful protests, while not carrying weapons of any type, and upon providing notification as regulated by law. The right to peaceful, private meetings is guaranteed, without the need for prior notification. Security forces may not attend, monitor or eavesdrop on such gatherings.”²⁷⁷ However, president al-Sisi has issued a law that bans protests. The protest ban law or *Qanwn al-Tazahor* was issued for two reasons. Firstly, to curb increasing protest of the overthrow of ex-president Mohamed Morsi, which lead the regime to ban the Muslim brotherhood supporters from protesting. Secondly, the law is used to oppress opponents to regime. Fragility of the regime cannot tolerate any form of opposition.

The second freedom right is the freedom of expression. Article 65 of the 2014 Constitution ensures freedom of thought. It states “freedom of thought and opinion is guaranteed. All individuals have the right to express their opinion through speech, writing, imagery, or any other means of expression and publication.”²⁷⁸ However, the regime has taken into custody several young people for their exercise of this right by criticizing the current regime. Using an interpretation of the terrorist law, a child (aged 16) wearing a t-shirt, which said he was against arbitrary detention, was arrested and detained for more than two years. The only charge against him was wearing a t-shirt with a logo “incriminating terror.” The Judiciary was not able to grant the child, together with many others their basic right of freedom of expression.

The third right is the freedom of religion. Article 64 of the 2014 Constitution states that “Freedom of belief is absolute. The freedom of practicing religious rituals and establishing places of worship for the followers of revealed religions is a right organized by law.”²⁷⁹ However, there are several incidents, where the judiciary was not able to protect the freedom of religion of Shi’a, Bahai, Christians, or atheists. For example the Christians’ right to build and renovate churches: article 235 states that “in its first legislative term after this Constitution comes into effect, the House of Representatives shall issue a law to organize building and renovating churches, guaranteeing Christians the freedom to practice their religious rituals.”²⁸⁰ Christians and the three Churches defend the previous article in order to build or restore their churches freely.²⁸¹ Building or restoring churches has been hardly granted by a president, mayor, or the governorate. This right is only granted by permission by the national security agency. Building churches was never a right to Christians. The discriminatory policy against the freedom of religion is a policy that was developed decades ago, and it is still effective until the present time. Courts were not able to protect their rights of free practices, which have a constitutional basis.²⁸²

B) Inefficient Transparency Questions:

1. Forms of lacking transparency

²⁷⁷ § 73 EGYPT CONST. (2014)

²⁷⁸ § 65 EGYPT CONST. (2014)

²⁷⁹ § 64 EGYPT CONST. (2014)

²⁸⁰ § 235 EGYPT CONST. (2014)

²⁸¹ In 2015, al-Sis and the army promised to restore all the burned church as arson. *See in that regard*, Egyptian president promises to restore Egypt’s burned Churches, Barnabas Fund, {December 01, 2015}, <https://barnabasfund.org/news/Egyptian-President-promises-to-restore-Egyptys-burned-churches>

²⁸² *See*, Egypt’s Religious Freedom Farce, The National Interest, { May 21, 2015}, <http://nationalinterest.org/feature/egypt-religious-freedom-farce-12935>

The judiciary often withholds necessary information concerning judicial administration from the public. Each circuit and prosecution district office issues its own statistics, related to its work. This data is sent monthly to the Ministry of Justice and to the attorney general. Nothing of these data is made available to the public. There is no public institute within the judiciary to announce judicial data related to the number of cases or their types. This is a violation to Article 68/1 of the 2014 Constitution, which regulates access to information and official documents. It states “Information, data, statistics and official documents are owned by the people. Disclosure thereof from various sources is a right guaranteed by the state to all citizens. The state shall provide and make them available to citizens with transparency.”²⁸³

Additionally, the attorney general has the ultimate authority to ban the publication in certain cases, a prerogative offered to him to protect the confidentiality of the processing of some cases. This was met with much criticism. The main reason for this criticism is that the attorney general is thus undisputed or checked by any national independent bodies and/or regulatory agency. Between the period of July 2013 to July 2015, the attorney general has banned publication in more than 15 cases, all related to corruption, police or judicial violations.²⁸⁴

Secondly, withholding data is also related to the corruption of the judiciary. The publication of data leads to interference with the administration of justice, which is the responsibility of the Ministry of Justice. The Ministry of Justice withholds such information, since it is part of the transparency judicial process. Public demand for revealing data is considered by the Ministry of Justice to be interference in the judicial independence.²⁸⁵

Thirdly, neither the judiciary nor the public prosecution appoints a public speaker to address the public with judicial and public concerns. This problem is also related to legitimacy of the source of information. The Judiciary in Egypt still deals with the people using a monarchical mindset. The judiciary has never paid attention to public demand of information, since it got its authority from the King.²⁸⁶ While in the republic system, where the authority is to the people, the judiciary should be accountable to the public. The source of legitimacy has been shifted from the king to the people. As a result, there are no public statements that concern popular cases, either from the judiciary or public prosecution.²⁸⁷

2. The reasons behind lacking transparency

There are two reasons for the lack of transparency in the Egyptian Judiciary. Firstly, there is a lack of legal responsibility regarding judicial transparency. The 2014 Constitution indicates that there shall a forum in which citizens can file complaints against withholding access to public data. It also maintains

²⁸³ § 68/1 EGYPT CONST. (2014)

²⁸⁴ Ahmed al-Bahnasawi, Qadaia hazr alnashr monzo 30 July le-elrashowh aljansayah, Al Watan News, {July 2015}, <http://www.elwatannews.com/news/details/777221>

²⁸⁵ The website of the Ministry of Justice does not include any information regarding the ministry except news on the Minister of Justice Ahmed al-Zend and his assistance. There is not any information about the ministry or the judiciary on the website regarding the necessary data of work achieved or pending work. *See in that regard the Ministry of Justice website*, <http://www.jp.gov.eg/ar/Default.aspx>

²⁸⁶ After Gulie Regeni – Italian student found dead and torture- murder, the assistant attorney general/ Chancellor Mustafa Khater made a press conference. He stated that such conference is the first of its kind. It is not to answer any question regarding the investigations, rather it is to answer question related to the Public prosecution delegates visit to Italy.” To see the full press conference please visit, (April 9th, 2016) <https://www.youtube.com/watch?v=enHZ1up5a5U>

²⁸⁷ The Supreme Judicial Council has issued a decision to ban all judges and prosecutor from making public statements. The violators of such decision are subject to disciplinary proceedings. The decision was issued in 2014 to face the increasing number of judges and prosecutor who show in public programs. *Also*, there is a new decision to ban the judges and prosecutor form writing on social media. *See in that regard*, <http://www.youm7.com/story/0000/0/0/-/1576415#.VswPMJN1g>.

that there must be a responsibility in cases of non-conforming. Article 68/2 states that “law shall organize rules for obtaining such, rules of availability and confidentiality, rules for depositing and preserving such, and lodging complaints against refusals to grant access thereto. The law shall specify penalties for withholding information or deliberately providing false information.”²⁸⁸

The previous legal and constitutional right is not applicable to the judiciary. The judicial authority will always be immune to this rule. Theoretically, there are two ways to request the judiciary to publish data. The first way is through adjudication against negative administrative judicial decision, which is not publishing courts and prosecution data. The public has the capacity to sue the judiciary by law, in order to force them to publish data. However, historically the public does not. This has been always the dilemma of successive judicial authority law. Article 84 of the Judicial Authority law outlines the ways of adjudicating against administrative decisions. Decisions vary, among which are: judicial appointment, judges’ transfers between courts, organization of courts, in addition to regulation and finances. The article assigns the civil circuit in Cairo Court of Appeal to be responsible for all cases related to annulment of judicial administrative decisions. The competent plaintiffs in these cases are only judges and public prosecutors.²⁸⁹ If any member of the public is wronged by an administrative decision, he/she will not be able to recover from such infliction.²⁹⁰

The second reason for a lack of transparency is the political process. While the Minister of Justice is a member of the Cabinet, the Prime Minister does not request making data available to the public. However, this does not happen since there is no political responsibility to either judiciary or attorney general, which is part of the legitimacy of the judiciary. Besides, the Cabinet would not issue an official request from the Minister of Justice requesting that such data be made available to the public. This is because they fear executive interference in judicial affairs. This method has neither proved efficient or applicable, since data was never published in the first place.

C) Courts’ interference in governmental war against NGOs

The legal framework has standardized the role and tasks of civil organizations and institutions in Egypt in the Law 84/ 2002. The law mandates state authority over civil organizations, and limits their role to specific functions. An example is leashing the socio-political role of civil organizations, and their viability to lobby as a social tool towards civic development and growth. The civil society and its potential to play a great role have been negatively affected after a number of cases, of foreign funding, have made headlines. In the famous case of illegal foreign funding case, some NGOs were convicted of receiving funds from foreign agencies, which is prohibited by the above-mentioned law.²⁹¹ Governmental reports that were announced to the public at the time stated that these organizations have failed to obtain the required permission for operation. However, the true reasons were political. Either way, this reflects legal framework of operating civic organizations.

²⁸⁸ § 68/2 EGYPT CONST. (2014)

²⁸⁹ § 83 JAL (1972), Egypt; it states that The Civil Court of Appeal circles Cairo headed by presidents that this Mahkmh, without Gerha, to decide cases brought by the judiciary and public prosecution abolition of final administrative decisions relating to any affair of their affairs. And specializes in this Aldoair, without Gerha, decide on compensation for those making claims. As Takhts, without Gerha, decide cases for salaries, pensions and bonuses owed to the judiciary and public prosecution or to their heirs. It may not be sitting for the adjudication of these claims of who was involved in the decision, which filed the case because of it. And be challenged in the judgments handed down in cases provided for in paragraphs Alsabakh, circles in front of the Civil and Commercial Court Anakd, material without Gerha, within sixty days from the date of the judgment.

²⁹⁰ This applies to the candidates who got rejected from appointing in the judiciary. These candidates try to litigate such case at the civil circuit in Cairo Court of Appeal, the circuit would rule that they are not competent personal for such cases based on § 83 JAL (1972).

²⁹¹ Background on Case no. 173 of foreign funding case , <http://eipr.org/en/pressrelease/2016/03/21/2569>

Many countries contribute to the existence of a powerful civic society. Taking the example of the US, the civil society is characterized by three factors: independence of governmental pressure and the freedom for decision-making, private funding of NGOs, as well as a socio-political role. Conversely Egypt takes a different stand, where the civic role is diminishing in steering political and economic change in the country. Civic societies are state-dependent on various fronts, including license issuance, permits for running NGOs, acceptance or rejection of foreign funding, as well as state supervision on monetary transactions. Secondly, when such organizations in Egypt receive government funding, funds are considered communal capital, and their personnel are public officials. Thirdly, NGOs are prohibited from practicing any political roles. If an NGO faces a certain deficiency in services, funding or infrastructure, it is unable to lobby or apply pressure on the administration and the legislator to improve the regulatory environment.

The elimination of the governmental funding and administrative domination is a must after the revolution. The practice arises from historic tradition or experience, from the known authoritarian nature of the government involved, or from a sense that acceptance of government funding.²⁹² However, in civil law countries, human rights' lawyering organizations are charity organizations. They fight for the people's interest where governments fail to recognize people's effort to achieve their goals. Hisham Mubarak Law Center is a human rights organization that primarily uses litigation to accomplish its objectives.²⁹³

D) Court failures in Previous regimes trails

The Army was satisfied with the ordinary judiciary and its prosecution for the trial of figures of previous regime. However, trials failed to reach truth and justice. They were unable to touch on prominent figures of the past regime for crimes committed against humanity since 2002. Crimes ranged between killing and torture of Egyptian political opponents over the years. Since the actualization of the ICC convention in 2002, the landmarks of the previous ruling figures have not been prosecuted thus far. Secondly, trials were conducted about atrocities that the regime has committed during the eighteen days of the Revolution.

The judiciary was not able to recognize the collective responsibility of the past regime. The prosecution of Mubarak and his assistants has passed on to be handled by two specialized courts: the felony court and the Court of Cassation. Within the felony court, all convicted individuals have been acquitted of all the crimes they were accused of. Only Hosni Mubarak and the previous Minister of Interior, Habib El Adly, have been convicted of killing. The court has based its verdict on the fact that Mubarak and Habib El Adly actions were not pre-meditated, "despite knowing for sure the proceedings of the events, and the interventions of criminal elements amount the protestors."²⁹⁴

The Court of Cassation challenged the previous finding of the felony court, and built its argument on the fact that the previously mentioned bases are not recognized in the Egyptian criminal law. It also states that it is not legally sufficient to declare the criminal responsibility of Mubarak and Adly.²⁹⁵ Hence, the Court decided to accept Mubarak and Adly's appeal, and returned the case for pleading back to the felony court. The impact of the Egyptian trials meant there was social justice. Justice will not prevail unless offenders from the previous regime were put to trial. .²⁹⁶

²⁹² Richard J. Wilson, Jennifer Rasmusen, and researched by Scott Codey, Promoting Justice: a practical guide to strategic Human Rights lawyering, IHRLG

²⁹³ *Id* at 33

²⁹⁴ Case no. 3642/2011 Felony- El Menyal District and 1227/2011 Felony- Kasr El Nile

²⁹⁵ Court of Cassation -Appeal no. 5334/82 Judicial year- Public Prosecution Bureau vs. Mohamed Hossni Mubark

²⁹⁶ Unlike what happened at the end of World War I, a commission, set up by the Allied Forces, recommended that since defeated powers have violated conventions of war, high officials should be prosecuted for ordering such crimes and on the

III. Economic reasons: Court Failure with Corruption Issues:

A) Failure in Facing Corruption Cases

1. Anti-Corruption Agencies

Since 1971, Successive constitutions have established independent bodies and agencies to fight corruption.²⁹⁷ The legal basis of these agencies was based on its own law.²⁹⁸ The current 2014 Constitution gives a constitutional foundation to such agencies and bodies. In Section Seven, Subsection two of the 2014 Constitution; the constitution regulates the national independent bodies and regulatory agencies. The main aim of these agencies is to discover and eliminate corruption in different sectors of the country. It also plays a role in the regulation of certain activities, as it will be shown in the following section. The current agencies, according to article 215/2, include “the Central Bank, the Egyptian Financial Supervisory Authority, the Central Auditing Organization, and the Administrative Control Authority.”²⁹⁹

The Central Bank implementing strategies, which are in the process of, collapse the monetary policy in Egyptian market. The Bank is “responsible for developing and overseeing the implementation of monetary, credit and banking polices, and for monitoring banks. It is exclusively entitled to issue banknotes.”³⁰⁰ Moreover, the Central Bank is responsible for “[the] safety of the monetary and banking system, and the stability of prices within the framework of the state's general political economic policy, in the manner organized by law.”³⁰¹

Secondly, Article 221 is the basis for the Financial Supervisory Authority. It states that “the Egyptian Financial Supervisory Authority is responsible for monitoring and supervising markets and non-banking financial tools including capital markets, futures exchanges, insurance activities, real estate funding, financial leasing, and factoring and securitization, in the manner organized by law.”³⁰²

Thirdly, Article 219 is the article related to the Central Auditing Organization. It states “the Central Auditing Organization is responsible for monitoring the funds of the state, public legal personalities and other bodies to be identified by law; for the implementation of the state budget and independent budgets; and for reviewing its final accounts.”³⁰³

Fourthly, the 2014 Constitution does not regulate the Administrative Control Authority except as an independent agency to fight corruption.³⁰⁴ Administrative Control Authority ACA was established in

basis of command responsibility. It was also suggested that an Allied High Tribunal be established to prosecute violations of laws and customs of war and the laws of humanity. After World War II, two ad-hoc tribunals were set up. The first was the International Military Tribunal at Nuremberg (IMT), and the second was the International Military Tribunal for Far East (IMTFE). As a result, retribution and continuous chaos would not be an option.

²⁹⁷ The aim of drafting a Constitution that closes the door for any corruption or tyranny, heals the wounds of the past from the time of the old Eloquent Peasant to the victims of negligence and the martyrs of the revolution in our time, and relieves our people of the injustice they have suffered from for long.

²⁹⁸ § 218 EGYPT CONST (2014) states the general rule related to corruption fighting. It states that “the state is committed to fighting corruption, and the competent control bodies and organizations are identified by law. Competent oversight bodies and organizations commit to coordinate with one another in combating corruption, enhancing the values of integrity and transparency in order to ensure sound performance of public functions, preserve public funds, and develop and following up on the national strategy to fight corruption in collaboration with other competent control bodies and organizations, in the manner organized by law.”

²⁹⁹ § 215/2 EGYPT CONST (2014)

³⁰⁰ § 219 EGYPT CONST (2014)

³⁰¹ § 220/1 EGYPT CONST (2014)

³⁰² § 221 EGYPT CONST (2014)

³⁰³ § 219 EGYPT CONST (2014)

³⁰⁴ There is not any independent article in 2014 Constitution related to the competence of administrative control authority.

1958. It was part of the administrative prosecution until 1964. It then became an independent body that is responsible for revealing administrative, technical and financial crimes.³⁰⁵ There are many doubts about the political neutrality of the ACA, even though it is supposedly an independent agency. However, ACA members have honorable record in revealing many corruption cases. The only case of corruption against ex-president Mubarak was delivered from the ACA investigator Colonel Mo'tasam Fathi.³⁰⁶

2. Failure of Anti Corruption Agencies to Face Mass Corruption

The previous four agencies are still facing the great challenge of increasing corruption Egypt. This section aims to highlight the challenges that such agencies face to fight corruption. The central auditing organization investigates financial corruption of all public agencies--including judiciary, legislative and executive branches of government.

Firstly, Central Bank and the Financial Supervisory Authority are responsible for the monetary policies in the country. These policies have faced unprecedented crises since 2014, and thus the Central Bank and the Financial Supervisory Authority have been unable to enforce regulations on foreign currency exchange, availability, and the banking system including commercial money and transfers. Initially, fund transfer was a complicated issue. Merchants used the black market not only for getting foreign currency, but also for transferring their funds. Merchants reverted to paying foreign currency from a middleman, who smuggled money from abroad to pay for their goods.³⁰⁷

The foreign currency black market has become a national issue. Newspapers publish daily both the formal, and black market exchange rates. The Central Bank failed to offer foreign currency in a free market-basis. The discrepancies between the two markets reaches up to 10%. Additionally, the recent decision to limit foreign currency deposit in banks for companies to the amount of \$10,000 a day and 50,000 a month limits export potential.³⁰⁸ As a result there is an increasing crisis in the financial market in Egypt. Secondly, members of the Administrative Control Authority, as mentioned earlier, have an honorable record in seizing corruption cases of former and current public officials. However, the administrative Control authority as an agency still faces many challenges regarding its independence.³⁰⁹

3. The Role of the Judiciary in the previous failure

All Independent Bodies and Regulatory Agencies are independent. Both the constitution and the regulation of such agencies maintain their independence from the executive authorities. Each of these agencies has its regulation.³¹⁰ Their independence is legal, technical, financial and administrative independence.³¹¹ Besides, the constitution maintains such independence to members of these agencies. The reason for “protection for its employees and the rest of their conditions, is to ensure their neutrality and independence.”³¹² The only intervention from the executive authority is the appointment of the

³⁰⁵ Shafik Shawky, Administrative Control Authority Egypt, <http://www.icac.org.hk/news/issue12eng/button4.htm>

³⁰⁶ Mo'tasam Fathi, *Saqr alraqabah aladarayah allazi sajan Mubarak be-alqosowr alrasayah*, Tahrir News, {January 09, 2016} <http://www.tahrirnews.com/posts/365590>

³⁰⁷ Central Bank ban the exchange of the US 100 bills to face the increasing number of money smuggling, to read more visit, al-Masry al-Youm, CBE bans exchange of US 100 Bills to counter smuggling, Egypt Independent, {March 30, 2015} <http://www.egyptindependent.com/news/cbe-bans-exchange-us100-bills-counter-smuggling>

³⁰⁸ Mohamed Ahmed, Foreign Companies Face difficulties in transferring profits overseas Daily News Egypt, {September 21, 2015} <http://www.dailynewsegypt.com/2015/09/21/foreign-companies-face-difficulties-in-transferring-profits-overseas/>

³⁰⁹ The Administrative Control Authority Really Fight Corrruption in Egypt?. Mada Masr, {September 15, 2015}, <http://www.marsad.eg/en/2015/09/12/can-the-administrative-control-authority-really-fight-corruption-in-egypt/>

³¹⁰ § 220/2 EGYPT CONST (2014)

³¹¹ § 215/1 EGYPT CONST (2014)

³¹² § 216/2 EGYPT CONST (2014)

president, and heads of the independent bodies. Article 216/2 of the constitution gives the president of the republic the right to appoint “the heads of independent bodies and regulatory agencies upon the approval of the House of Representatives with a majority of its members, for a period of four years, renewable once.”³¹³

The first crisis relates to the independent anti-corruption agencies. They are unable to reinforce the Independent Bodies and Regulatory Agencies independence. A new law (number 89, year 2015), issued by the president, gives the president the right to impeach heads of Independent Bodies and Regulatory Agencies in Egypt from office. Even though such a law is a clear violation of the 2014 Constitution, the president has used his legislative authority to issue this law in absence of the parliament. This law violates the article 216/2, which states, “They [heads of the independent bodies] cannot be relieved from their posts except in cases specified by law.”³¹⁴

The second crisis is the domination of politics in Independent Bodies and Investigative authorities over their legal nature. After January 25th Revolution, there were always doubts regarding the political will to fight corruption. There was a public call to ensure that the political will should not stand against the transparency of the administration. The existence of independent bodies before the revolution did not decrease the ability of the public officials to hide their corruption, while still in service. For example, the only case in which Mubarak was finally convicted was a corruption case. It was called “Presidential Palaces.” It was among several corruption cases that he got acquitted from, for lack of sufficient evidence. In this case, Mubarak was convicted of embezzlement, where he used public funds to renovate personal presidential palaces.³¹⁵ The Court of Cassation maintained the Felony Court ruling of 3 years imprisonment and repayment of a 125.8 Million Egyptian Pounds {approximately \$16 Million}.³¹⁶ As a result, the 2014 Constitution specifies two methods to report corruption. The first is political; while the second is legal, both of which are complementary to each other.

As for political reporting, article 217/1 of the 2014 Constitution states “Independent bodies and regulatory agencies present annual reports to the President of the Republic, the House of Representatives and the Prime Minister at their time of issuance.”³¹⁷ The Constitution did not give the president any clear role; rather it gave legislative arm the ability to respond to such allegations from independent bodies. The second paragraph states “the House of Representatives considers such reports, and takes appropriate action within a period not exceeding four months. The reports are presented for public opinion.”³¹⁸ As for the legal part, the 2014 Constitution mandates that the Independent bodies and regulatory agencies must “notify the appropriate investigative authorities of any evidence of violations, or crimes they may discover.”³¹⁹ Such agencies, which are the public and subject to administrative prosecution, shall “take the necessary measures with regards to these reports within a specified period of time,” according to the Constitution.³²⁰

B) Central Auditing Organization and its conflicts

³¹³ § 220/1 EGYPT CONST (2014)

³¹⁴ § 216/2 EGYPT CONST (2014) ,

³¹⁵ Aswat Masriya, Court of Cassations rejects Mubarak’s appeal in presidential Palaces case, Egypt Independent {January 09, 2016}, <http://www.egyptindependent.com/news/court-cassations-rejects-mubarak-s-appeal-presidential-palaces-case>

³¹⁶ Tarek al-Tablawy, Egypt’s Mubarak Gets 3 years in Palace Funds Embezzling Case, Bloomberg Business {May 21, 2014}, <http://www.bloomberg.com/news/articles/2014-05-21/egypt-s-mubarak-gets-3-years-in-palace-funds-embezzling-case>

³¹⁷ § 217/1 EGYPT CONST (2014)

³¹⁸ § 217/2 EGYPT CONST (2014)

³¹⁹ § 217/3 EGYPT CONST (2014)

³²⁰ § 217/3 EGYPT CONST (2014)

Since 2013, there have been two major conflicts between the Central Auditing Organization (CAO), the judiciary and executive authorities. The first conflict between the CAO and the executive authority has two dimensions. Initially, the Muslim Brotherhood president Mohamed Morsi appointed the president of the CAO. When the coup ousted Morsi from the presidency, they were not able to remove the Chancellor Hesham Genena, who is a prominent member of the IJM, from his post as the president of the CAO.

Removing Genena was a side fight that the military did not wish to take at that time until they paved the road to impeach him. After Field Marshall Abdel Fatah al-Sisi assumed the presidency, he took two steps to remove him from office. Firstly, al-Sisi appointed a vice president to CAO, who is Chancellor Hesham Badawi.³²¹ Second, he issued a law that gives him the right to impeach presidents of the national Independent Bodies and Regulatory Agencies. Sisi successfully impeached the Genena, and Badawi assumed the role of CAO president.

The second conflict was between the CAO and the judiciary, which has both personal and institutional perspectives. For the personal issue, there are scores to settle between Chancellor Hesham Genena as a member of the IJM and Chancellor Ahmed al-Zend as the president of Judges Club and the Minister of Justice (2015- present). Both of them represent a contradictory ideology in the justice administration, which was discussed in the first chapter (put page number where specifically discussed).

The institutional perspective in the conflict is presented in the corruption cases that Chancellor Hesham Genena discovered against the Judges Club and its president. This was during Chancellor Ahmed al-Zend tenure as president of the Judges' club. Chancellor Hesham Genena has states several times that there are many financial violations in the club, represented in salaried journalists, who work as media advisors to the club. He also states that CAO owns documents that incriminate Chancellor Ahmed al-Zend for buying public lands below market value. As a result there are many pending cases regarding these allegations.

Additionally, the Administrative Prosecution Bureau has declared the suspension of cooperation between the bureau and the CAO. The President of the Bureau issued decision number 2 for year 2016, which states that the bureau shall not inform the CAO of any cases that relate to financial violations.³²² The president of the Bureau based his decision on his own understanding to article 197 2014 Constitution.³²³

All the previous steps lead to the increase of public feeling that Chancellor Hesham Genena will be removed from office soon. As a response to all these steps, Chancellor Hesham Genena declared in December 2015 that the cost of corruption born by the state is estimated to be more than 600 Billion Egyptian Pounds (\$95 Billion USD) from 2012 to 2015. He also states that the CAO has all the

³²¹ Chancelor Hesham Badawi was the previous District Attorney of the national security prosecution office.

³²² Periodical no. 2 year 2016 {February 13, 2016} Chancellor Samah Kamal

³²³ § 197 EGYPT CONST (2014) states that “the Administrative Prosecution is an independent judicial body. It investigates financial and administrative irregularities, and those referred to it. Regarding these irregularities, it has the authorities vested in the administration body to inflict disciplinary penalties. Challenging its decisions takes place before the competent disciplinary court at the State Council. It also initiates and conducts proceedings and disciplinary appeals before the State Council courts in accordance with the law. All the foregoing is organized by law. Other competencies are defined by law. Its members share securities, rights and duties assigned to other members of the judiciary. Their disciplinary accountability is organized by law.”

required documents to prove the corruption.³²⁴ As a result of this statement, all the plans to remove him from office were suspended until further investigation is taken, given such a high amount of corruption.

IV. Political Reasons for Reform: Politics and Judicial Law

A) De Jure: Prohibition of political participation

The history of judicial authority law maintains a strict ban on both judges and courts from participating in political activities. Article 17 of the judicial independence law of 1943 states, “courts are prohibited from expression political opinions and tendencies, and judges are prohibited from engaging in politics.”³²⁵ In 1952, a new amendment to the previous article was introduced. The amendment banned the right of the judges to run public elections. The new article states “judges are prohibited from engaging in politics or nomination for public elections.” In the second case, the judge would be considered to have resigned from his job since the date of his nomination elsewhere.”³²⁶

During the Nasser era, there was a clear understanding of the term ‘people.’ This understanding is based on joining the ruling party.³²⁷ It was normal for Nasser to ask the judiciary to join the Arab Socialist Union, as they are members of the ‘people’. However, this request and understanding was contradictory to the judicial authority law of banning any form of political participation.³²⁸ It was part of the legal ambivalence during Nasser’s era. There was no fear of judges running for elections, since there were no political parties during Nasser’s period. The legislative authority was given to the cabinet.³²⁹ There was no fear of the judiciary nominating its members in a totalitarian regime. Rather, there was a desire for the judiciary to unite in that regime. In 1972 the judicial authority law restored the ban on political participation on judges, with the intention of opening up pluralistic political participation.³³⁰

During the Mubarak period, nothing had changed until the year 2000. The Supreme Constitutional Court judgment in 2000 mandated full judicial supervision over elections as the right interpretation of the constitutional wording of judicial supervision. Even though this judgment did not give permission for judges to participate in politics, it established a new role to the judiciary as the protector of politics against Mubarak’s totalitarian regime. Since that date, the article banning political participation was considered controversial in the judicial authority law. Hence, there is a pending question of what are the limits of judges’ political participation?

B) De Facto: the political participation of judges in politics

1. Election Supervision

There are two contradictory interests that the political circumstances of Egypt have created. The first is the prohibition of participation of judges in the political life, while the second is the constitutional mandate on judges and courts to supervise the elections.³³¹ The first role requires prohibition of doing

³²⁴ Egypt’s Sisi appoints committee to investigate corruption claims, *Ahram online English* {December 27 2015}, <http://english.ahram.org.eg/NewsContent/1/64/177487/Egypt/Politics-/Egypts-Sisi-appoints-committee-to-investigate-corr.aspx>

³²⁵ § 17 JIL (1949) Egypt

³²⁶ § 16, JIL {September 14, 1952}, Egypt

³²⁷ TAREK AL-BASHRI, *DOCMRACTAAYAT NAZAM YOLYOW* 23 (1952-1970), {1st ed. 1987}, 115-120

³²⁸ The ban of the political participation is discussed in many points in this research. it is maintained from the first judicial independence law in 1940s till the present day.

³²⁹ ID AT 100-110

³³⁰ § 77 JAL {October 5, 1972}, Egypt

³³¹ § 239 JAL {October 5, 1972}, Egypt states that “The House of Representatives issues a law organizing the rules for delegating judges and members of judicial bodies and entities to ensure cancelling full and partial delegation to non-judicial bodies or committees with judicial competence, or for managing justice affairs or overseeing elections, within a period not exceeding five years from the date on which this Constitution comes into effect.

the second. However, the current situation of the absence of independent electoral institution has forced the judiciary to be responsible for the election process. Judiciary was able to play such role due to their institutional strength, and the independence of its members.

Judges were forced to supervise the election after 2000 SCC judgment. In January 25th Revolution, full judicial supervision over elections was requested. In the first incident, judges were used to enhance the “democratic” image of the regime. It was easier for the regime to falsify the election on the sub-committee level, and then submit the results to judicial primary committees to announce the results, which were prepared by the regime in the sub-committee).³³² However, once the judicial supervision extended to the sub-committees, the regime made a constitutional amendment in 2007 to limit it to the primary and the supreme electoral committees.

The 2014 Constitution has formed a permanent National Elections Commissions composed of judicial members. Article 209 of the constitution states that the commission consists of “10 members selected equally from among the vice-presidents of the Court of Cassation, the presidents of the Courts of Appeal, the vice-president of the State Council, the State Affairs and Administrative Prosecution, who are to be selected by the Supreme Judicial Council and special councils of the aforementioned judicial bodies.”³³³ As for the president of the Commission, it is the president of the Court of Cassation. As for the sub-committees members, article 210/1 mandates that “voting and counting of votes in referenda and elections run by the Commission is administered by its affiliated members under the overall supervision of the Board. It may use the help of members of judicial bodies.”³³⁴ Moreover, the constitution maintained the role of the judiciary in supervising the election until 2024. Article 210/2 states that “the voting and counting of votes in elections and referenda in the 10 years following the date on which this Constitution comes to effect are to be overseen by members of judicial bodies and entities in the manner set out in the law.”³³⁵

2. The Role of the judiciary in Politics

As previously mentioned, judges have been banned from political participation since the 1930s. Judges cannot nominate themselves for the parliament, and courts cannot have political affiliation. Secondly, the SCC (overruled this legal rule. The judgment mandated full judicial supervision over the elections. Thirdly, the regime did not have strong popular support by the citizens. It was used to falsifying results to maintain its authority. Judges did not accept such election fraud in 2005, and endorsed the success of certain candidates contrary to the Supreme Electoral Committee. Instead of supporting the judges, the Supreme Judicial Council has started the impeachment process against them for violating the legal tradition of banned political participation.

The current status of electoral commission is in favor of bringing back previous practices of election fraud. In order to replace the judiciary, strong bodies are required to make that shift from judicial supervision to an independent electoral commission. Moreover, the judiciary is likely to maintain its role in supervising the election if the newly appointed commission is not fully successful or in case of the collapse of the current regime. The former case would occur if al-Sisi regime remained in power, and the regime was not able to build such independent commission. As for the latter case, it is likely to occur in the case of the collapse of the regime. The constitution was built with excluding the Islamist, and political activism and most of liberal bodies. Such circumstances recommend that it would be subject to change with the collapse of the regime. As a consequence, judges are more likely to be

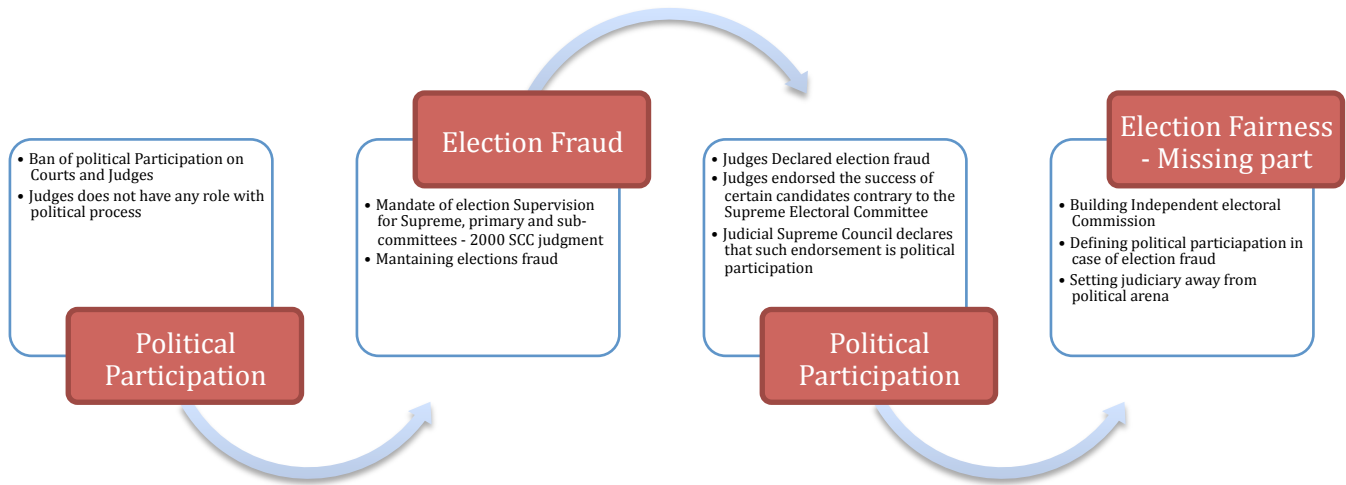
³³² Election of 2005, there were many allegation and judicial investigations regarding the election fraud, please refer to chapter one for more details regarding the election fraud.

³³³ § 209 EGYPT CONST (2014)

³³⁴ § 210/1 EGYPT CONST (2014)

³³⁵ § 210/2 EGYPT CONST (2014)

engaged in the political arena as long as such independent commission is not seriously in effect. This relationship is represented in the following graph.



C) The legitimacy of the judiciary

In the name of the King/God or the name of the people, are the first words of any judgment. It does not only reflect the type of political system in a given country – either monarchy or republic--it also reflects the source of legitimacy or authority of the judges. Many judges argue that the judicial status during the monarchy was better than what it is during the republic. There are many reasons for that difference. As for the judicial source of legitimacy, during the Monarchy, judges paid homage to the King. Their judgments were issued and enforced in the name of the king. There was no need for a definition of a king, as his role was clear in the justice process. Currently, judgments are issued and enforced in the name of the people, while there is a lack of a clear definition to what is the role of people in the judicial process. In that sense, there should be a legal compromise between the developments of the source of legitimacy in two different eras.³³⁶

Firstly, there are two different types of legitimacy in that sense. The judges' rules in the name of the king, the judges would not be considered the people in the judgment. The judge would only compromise with the sources of the legitimacy. Article 28 of the Egyptian judicial regulation law of 1949 states “judgments are issued in the name of the king.”³³⁷ This article was the basis for the interference of the Minister of Justice in the administration of the justice system. It was the main reason for the judiciary to never address any constitutional issues. The courts did not have any legitimacy to confront the laws that was issued by the king. It played a certain role only related to the interpretation and enforcement of the laws. There were clear lack of any form of checks and balance with either executive or legislative. Hence, the courts rose above the conflict with the king either from the issue of the constitutionality of the laws, or the interference in the justice administration.

Secondly, the current judicial authority law – article 20- states “judgments are issued in the name of the people.”³³⁸ However, there were no clear definitions of the people during the republic successive eras.

³³⁶ For the first time of the Egyptian constitutional history, article 100 of the 2014 Constitution states that “Court decisions shall be issued and implemented in the name of the people. “

³³⁷ § 28, Judicial Regulation law 1949.

³³⁸ § 20 JAL {October 5, 1972}, Egypt. In the former laws, which were also during the republic period, the article used the word “nation” instead of the “people”. The using of the word nation reflected the regime understanding to the Arab Nation. Is also reflected the union between Egypt, Syria and Yemen during that time.

The socialist/communist system of Nasser defined the people as one category of people, who are members of the Union. To Nasser, this would require the judges to either join the Union, or be loyal to it. When the judges refused to join the Union, he formulated a secret group inside the judges to ensure their loyalty of the judiciary. Even though this would comply with the understanding of the socialist/communist understanding of people, it would reflect totalitarian and exclusionary understanding to people. During Sadat and Mubarak, the concept of the people became vaguer than during Nasser's era. Instead of fixing the concept of the people to reflect a democratic form of government, they maintained the secret organization in the judiciary to a totalitarian and exclusionary understanding to people. As a result, it is not clear what the definition is of the people who are the purported source of the judge's legitimacy.

V. Legal reasons:

A) The judicial role in the inequality before the law

1. Judicial Independence: Unforeseeable financial issues

An independent judicial budget is a core element of judicial independence. The independent budget reflects an independent judiciary from the executive authority, while transparent judicial budget process reflects the judiciary as an accountable authority to the public.³³⁹ However, although they have an independent budget, it has never been made public.³⁴⁰ Thus while there exists an independent budget, it is lacking transparency and therefore accountability from the very body—the people—which supposedly give it power.

The full independence of the judicial budget was given to the judiciary in 2008 after judges fought for the independence of their budget. However, when judges received it, they neglected the judicial accountability aspect of their budget. There were many proposals, which served to maintain that the budget would be hidden from the public. These proposals finally reached a compromise that the legislative would discuss the budget of the judiciary, while it would maintain the secretive nature from the public (tax payers). For whole judicial bodies, article 184 of 2014 constitution states “All judicial bodies administer their own affairs. Each has an independent budget, whose items are all discussed by the House of Representatives. After approving each budget, it is incorporated in the state budget as a single figure, and their opinion is consulted on the draft laws governing their affairs.”³⁴¹ As for the supreme Constitutional Court, it has a special article that reiterates the previous rule. Article 191 of the 2014 Constitution states that the Supreme Constitutional Court “has an independent budget whose items are all discussed by the House of Representatives. After it is approved, it is incorporated in the state budget as a single figure.”³⁴²

2. Judicial Accountability: The unaccountable judiciary – Judicial Immunity

³³⁹ VICKI JACKSON, JUDICIAL INDEPENDENCE IN COMPARATIVE ANALYSIS, (Anja Seibert-Fohr ed., Judicial Independence in Transition}, 71.

³⁴⁰ There is a general understanding that some institutes shall not present their budget to the public. These institutes are army and judiciary. For the judiciary, § 185 of the 2014 Constitution states that “all judicial bodies administer their own affairs. Each has an independent budget, whose items are all discussed by the House of Representatives. After approving each budget, it is incorporated in the state budget as a single figure, and their opinion is consulted on the draft laws governing their affairs. “ As for the army, article 203 states that the national defense council is “responsible for looking into matters pertaining to the methods of ensuring the safety and security of the country, for discussing the armed forces’ budget, which is incorporated as a single figure in the state budget. “

³⁴¹ § 184 EGYPT CONST (2014)

³⁴² § 191 EGYPT CONST (2014)

Judicial immunity was meant to protect judges from civil damages as a result of their judgments. It is limited to civil damages with no regard to criminal liability.³⁴³ However, there is a misunderstanding regarding the nature of the judicial immunity in Egypt. It is not only civil immunity, but also criminal immunity. Judges enjoys a special status regarding their criminal liability status, especially regarding the rules of arrest, search and seizure procedures. They are not subject to the general rules related to search and seizure states in the criminal procedures law. The successive judicial authority laws since 1930s maintain a special status to the judges. This status prohibits any criminal action against judges and prosecutors unless from a special judicial committee. The committee includes president of the Court of Cassation, president of Cairo and Alexandria court of appeals and attorney general. The role of the committee is to impeach either judges or prosecutors.

The general immunity rules – both civil and criminal - in the Egyptian Judicial Authority law lead to inequality. First of all, a judge who commits a crime is prosecuted and trialed by his/her colleagues. Secondly, the formulation of the special committee that is responsible for investigating and prosecuting the defendant judge or prosecutor is made up of senior judges. Judicial disciplinary is the responsibility of the committee, among others. This committee will swear in for serious crimes like murder, while less serious crimes would definitely be of less priority to the committee. This understanding leads the prosecution to refrain from prosecuting traffic law violations, against any of the judicial authority members. There is a growing consensus among the public that judges are above the law.

3. Judicial Appointment: The unequal bases of appointment (women and poor)

There is discrimination against women (gender) and lower socioeconomic status (SES) (social class) candidates, preventing their joining of the judiciary. . In regards to gender inequality, Article 11 of 2014 constitution maintains the right of full equality between men and women in all aspects of life: “the state commits to achieving equality between women and men in all civil, political, economic, social, and cultural rights in accordance with the provisions of this Constitution.”³⁴⁴ However, the estimated number of public employees is 6 million employees. According to the Central Agency for Public Mobilization and statistics CAPMAS, the percentage of females employees in the public section in 2015 was 22.9%, while males were 77.1%.³⁴⁵ The percentage of female judges or administrative prosecutors is less than the overall percentage. Additionally, women cannot join either the State Council or the Criminal Public Prosecution Bureau. There is no legal basis for such prevention, as it will be discussed in the appointment chapter (Chapter 5).

The current constitution ensures full equality before the law. There shall not be any discrimination based on the social class. Article 53 of the 2014 constitution states “Citizens are equal before the law, possess equal rights and public duties, and may not be discriminated against on the basis of religion, belief, sex, origin, race, color, language, disability, social class, political or geographical affiliation, or for any other reason.”³⁴⁶ However, as it will be discussed in chapter six, there are many obstacles surrounding the appointment process, especially to under-represented people. The current judicial appointment system prevents lower socioeconomic status people - 26% of the Egyptian population lives under the poverty line, and 13% unemployment rates- from joining the judiciary.³⁴⁷ As a result, there is a question regarding judicial legitimacy in a system that eliminates quarter of the population from the appointment process.

B) Consequences of inefficient judicial education and training:

³⁴³ *Id* at 52.

³⁴⁴ § 11 EGYPT CONST (2014) .

³⁴⁵ Number of employee in public sector, CAPMAS {2015} www.capmas.gov.eg/Pages/IndicatorsPage.aspx?Ind_id=1104

³⁴⁶ § 53 EGYPT CONST (2014)

³⁴⁷ About Egypt, United National Development program, <http://www.eg.undp.org/content/egypt/en/home/countryinfo.html>

The problem of validity of two or more laws that regulate the same legal behavior includes two different drawbacks to certain behavior. This problem with the Egyptian Criminal Law that not many legal practitioners are aware of is due to the lack of efficient legal training. The reasons would be ignorance or looking the other way in facing problems. Even though the Egyptian penal law is supposed to be codified in the Penal code of 1937, the previous problem is to be considered as a prejudice to that codification.³⁴⁸

The conflict between two valid laws – three in some cases- raises many legal issues related to the right of the parties to secure their legal prediction. The problem of the existence of two laws regulating the same acts concerns legal practitioners, as well as the public. For the legal practitioners, who are the focus of the research, the existence of such condition in the legal system is violation to the legal security. Judges according to such problem will have to choose between the two laws to apply on the case.

There are two stages to passing a judgment. The first stage is where the judge determines that the act is a violation of a specific law. The second stage is that the judge determines the suitable law for the violator. While in the first stage, judges will not face a major problem since the two laws regulate the same activity, they will face it aggressively when they find the criminal is guilty and they wish to pass maximum punishment. The question that they will have to answer every time is which maximum punishment to be ruled. First of all, prosecutors have the right to release what is called a judicial order. These orders have the power of a verdict. The only condition is that the minimum punishment for it must be less than one thousand pounds (\$100 USD). Secondly, the prosecutors are obliged to choose the law that they consider the accuser had violated. So the question that raises which law they will choose from the two valid laws.

Figure (1):
Contradictory laws

Double jeopardy laws:	First Law	Contradictory law
Construction on Agriculture land/ Building outside the urban space	Article 156 of Law No. 53 of 1966 promulgating the Law of Agriculture, monitors the crime of construction on agricultural land or take action divided for this purpose or attempted prior to obtaining a license from the Ministry of Agriculture. The punishment that they impose is imprisonment and a fine of not less than ten thousand pounds and not more than fifty thousand pounds, and for the multiple offenses, clearance at the expense of the violator. The third paragraph of Article 102 of the above mentioned law, may be provided for the punishment of each of the resume of the	Article 2 of the Unified Construction Law had regulated the same crime. It had states that: Prohibit the establishment of any buildings or facilities outside the boundaries of the approved urban boundaries of villages, cities or areas that have no strategic plan is supported, or take any significant action in the division of these lands, and are excluded from this ban: (a) Land to be held by projects that serve agricultural production animal or part of the plan to be issued by decision

³⁴⁸ In the US, this issue has been solved several decades ago. The US Supreme Court maintained that the prosecutor has the right to choose between two valid laws.

work already stopped by administrative decision, despite the announcement that the penalty of imprisonment for not more than five years and a fine of not less than optimal business value of the violation, including not more than five hundred thousand pounds.³⁴⁹

of the Council of Ministers, upon the presentation of the competent minister to agriculture.

(b) Agricultural lands located outside cordons villages and cities, which are held by a private residence or services building, according to the controls established by a decision of the competent minister to agriculture.³⁵⁰

Crime of non-registration of birth of the new born

The Civil Status Law 143 for 1994 makes violation of such obligation from the parents of the newborn child as a misdemeanor, which its punishment is a fine of 200 pound³⁵¹

Child Law no 12 of 1996 makes the same violation with the same it as infraction, which the punishment is 10 pounds fine³⁵²

Crime of Forgery in the Identification Card

Article 213 of the Criminal Code states “punishment of temporary hard labor or imprisonment shall be inflicted on any civil servant at a public administration or a court who alters, with the aim of committing a forgery, the subject or status of the documents, in case they are written by the concerned official in charge, whether such alteration is by changing the declaration of the official staff in charge, and the purpose of such declaration is to include it in these documents, or by rendering it a forged fact in the form of a true fact while being aware of its forgery, or by shaping it into a recognized fact in the form of a recognized fact.³⁵³

Article 23 bis Personal Status Law No. 25 of 1920, as amended by Act 100 of 1985, states that “A husband shall be punished with detention for a period not exceeding six months or a fine not exceeding two hundred pounds or either penalties, if the husband made for documented incorrect data on marital status.³⁵⁵

Also Article 215 of the Criminal Code states that “any person who commits a forgery in the written acts of an individual by any of the aforementioned methods or uses a. forged paper while knowing of its forgery, shall be punished with penal servitude.³⁵⁴

³⁴⁹ §2 156 of Law No. 53 of 1966

³⁵⁰ §2 Unified Construction Law

³⁵¹ Civil Status Law (1994)

³⁵² Child Law (1996)

³⁵³ § 213 Criminal Code

³⁵⁴ § 215 Criminal Code

³⁵⁵ § 23 bis Personal Status Law

Crime of Midwifery

The Midwifery law no 481 of 1954 has mandated a license for the women who practice midwifery. Article 15 has states the punishment for not having such a license, which is a fine not exceeding one hundred pounds each for the demise of the profession of obstetrics in contravention of the provisions of this law and punishment will be doubled in case of recurrence³⁵⁶

Article eight of the Child Law states that for the sake of determining to the crime that

“It is not permissible for non-physicians to practice the profession of obstetrics, in any capacity whether public or private, only those whose names are recorded in the registers of midwives, assistant midwives, or doulas of the Ministry of Health can do so.”³⁵⁷

Article 13 of the Child Law states that for the sake of Punishment:

Without prejudice to any stronger penalty prescribed by the Law, shall be imprisoned for a period not exceeding six (6) months and a fine of not less than two hundred (200) Egyptian pounds and not exceeding five hundred (500) Egyptian pounds, or by one of the two penalties, whoever practices the midwifery profession in violation to the provisions of this Law. In case of recurrence, the perpetrator shall be liable to both penalties jointly.³⁵⁸

Crimes of Riding the train without paying fare

Article 20 of the railroad law no 277 of 1959 is stating “without prejudice to any stronger penalty prescribed by the Law, shall be imprisoned for a period not exceeding six (6) months and a fine not exceeding twenty Egyptian pounds, or by one of the two penalties.”³⁵⁹

Article 170 bis of the Rail Road Law that

A penalty of detention for a period not exceeding six months and a fine of not less than ten pounds and not exceeding two hundred pounds, or either penalty shall be inflicted on the following:

First: Whoever travels by railway trains or other means of public transport and refrains from paying the fare or the fine, or travels in a higher class than that of the ticket he carries and refrains from paying the difference.

³⁵⁶ § 64 Midwifery law (1954)

³⁵⁷ § 8 Child Law

³⁵⁸ § 13 Child Law

³⁵⁹ § 20 Railroad Law (1959)

	<p>Second: Whoever rides in a means of public transport sitting in other than the places provided for sitting.³⁶⁰</p>
<p>Forgery in the post stamps:</p>	<p>Article 229 of the Egyptian penal law states that: the penalties prescribed in the previous article shall be inflicted on whoever makes, carries for sale on the roads, distributes, or exhibits for sale printed matter or forms, whatever the manner they were made, which, in their external appearance resemble the marks and stamps of the Egyptian postal and Telegraph Administrations, or the Postal and Telegraph Departments in the member countries of the Postal Federation, in a way facilitating their acceptance instead of the counterfeit papers.³⁶²</p> <p>Article 30 of the Act 16 of 1970 of the mail system in Egypt make the crime of forgery of the stamps as a misdemeanor, and punish it with imprisoned for a period not exceeding six (6) months and a fine not exceeding fifty Egyptian pounds, or by one of the two penaltic³⁶¹</p>
<p>Smoking related crimes</p>	<p>Article 46 para 2 of the Egyptian environmental law no 4 of 1994 states “smoking is prohibited in means of public transport.” And article 87 paragraph 3 states that “anyone who smokes while using public transportation in violation of the provisions of para 2 of the said article shall be fined a sum of not less than ten Egyptian Pounds and not more than fifty Egyptian Pounds.”³⁶³</p> <p>Even though the same provision was states in the Tobacco Act no 52 of 1981, it has states different punishment, which is a minimum of ten pounds and a ceiling of one hundred pounds.³⁶⁴</p>
<p>crime of not vaccinate child</p>	<p>Article 25 of the Child Law mandates that the child shall be inoculated and immunized, free of charge, with vaccines protecting him from contagious diseases, at the health offices and health units, according to the systems and schedules as states in the By-laws. The father of the child, or the person, in whose custody the child is found, shall be responsible for presenting the child for vaccination or immunization. The inoculation or vaccination of the child may be carried out by a private physician licensed to</p> <p>Article 26 states that “without prejudice to the provisions of the Penal Code, any person violating the provisions of the previous article shall be penalized with a fine of not less than twenty (20) Egyptian pounds and not exceeding two hundred (200) Egyptian pounds.” The Communicable Diseases Act no 137 of 1958 states the same provision of the child law. However, it has states different punishment to the same act. Article 25 states that the violator to the provision of the Communicable</p>

³⁶⁰ § 170 bis Railroad Law

³⁶¹ §30 Mail System Law (1972) , {Egypt}

³⁶² §229 Penal law {Egypt}

³⁶³ §46/ 2 Environmental law 1994{Egypt}

³⁶⁴ Tobacco Act no 52 of 1981, {Egypt}

practice the profession, provided that the responsible person for taking the child for vaccination submits to the health office or the health unit, prior to the expiry of the specified date a certificate stating that the child took his vaccines.³⁶⁵

Diseases Act related to the children vaccination should pay a fine of twenty-five and not exceeds one Egyptian pound.³⁶⁶

crime
littering
in
public streets

article 37/4 of the Egyptian environmental law of 1994 prohibits the dumping of garbage and solid waste in such funds and places allocated to them, while article 87 of the same law punished whoever violates the provisions of Article 37/4 of this Law by fine of not less than one thousand Egyptian Pounds and not more than twenty thousand Egyptian Pounds.³⁶⁷

Article one of the Egyptian public sanitation law no 38 of 1967 states the same provision of the article 37/4. However, article 9 of the same law states different punishment for this provision by fine of not less than twenty Egyptian Pounds and not more than fifty Egyptian Pounds.³⁶⁸

VI. Conclusion

The Egyptian judicial system faces an interconnected web of serious problems. The contemporary challenges that face Egypt is not apart from the judicial challenge. The call for reform has been always a demand for all legal activists, including lawyers, judges and NGOs members. The previous chapter shows the history of the conflict between judiciary and executive from one side, and between members of the judiciary regarding the reform dilemma. After the success of the military coup in 2013, all calls for reform have been suspended under the auspices of security reasons.

The chapter tries to shed light on the importance of judicial reform in Egypt. The inability of the judiciary to respond to ongoing challenges continues to prevent the progress of Egyptian society as a whole. Strong governmental institutions need an independent and accountable judiciary to reinforce the law. The chapter presents these challenges and the role of judiciary in increase the tension of them, like the problem of corruption. The judiciary is facing a crisis in that field that would prevent any effective progress for the economy.

This chapter attempted to answer the question of why there shall be a reform to the judicial institutions. There is a reason for any institutional behavior. The call for reform can be internal or external reasons. Unlike the rest of the book, this chapter is only limited to the external reasons for reform. It discusses how the judiciary is failed as an institute to respond to many challenges. The chapter would numerate the judicial failures in facing series economic, social, legal and political challenges in contemporary Egypt.

³⁶⁵ §25 of the Child Law {Egypt}

³⁶⁶ §26 Penal Code, {Egypt}

³⁶⁷ §37/4, Environmental law (1994) {Egypt}

³⁶⁸ §1 Public Sanitation Law (1967) {Egypt}

Chapter Three

Judicial Independence versus Judicial Autonomy:

Outline:

- I. Introduction
- II. Judicial Independence in Egypt:
 - A. Background:
 - B. Present State of the Judicial Independence in Egypt
 - C. Judicial Independence: Independence on Bench in Egypt
 - D. Judicial Independence: Institutional Independence
 - E. The Issue of separation of power in the Egypt
- III. Application of judicial Independence and separation of power
 - A. Judicial Independence in the United States:
 - B. Judicial Independence in United Kingdom
 - C. Judicial Independence in France:
 - D. Judicial Independence in Germany
 - E. Judicial Independence in Russian Federation
- IV. Proposed reform to judicial independence:
 - A. Assessment of the judicial independence in the current constitution
 - B. The proposed amendment for the judicial independence
- V. Conclusion

I. Introduction

Judicial independence protects against “legislative violation of fundamental human rights.”³⁶⁹ The judiciary is a cornerstone in protecting liberty and impartial justice “against executive oppression and other executive or bureaucratic abuse.”³⁷⁰ Its independence means three main issues. Firstly, it means that judges shall be free from any form of outer pressure.³⁷¹ They shall be free from any commitment except to justice. Secondly, court decisions shall be subject to amendment only through a judicial adjudication, rather than executive or legislative methods, unless there is a constitutional amendment.³⁷² Thirdly, the law shall be the only source to determine the judicial decision, not under any form of political pressure.³⁷³

Judicial independence has been repeatedly implemented in the history of the Egyptian judiciary throughout different periods, except that of socialism, as presented in the first chapter. Additionally, the issue of the separation of powers and judicial independence is a very long struggle in the Egyptian judicial history. Even though the Constitution of 1923 did not mention such independence, there was a separate law concerning judicial independence, which in 1973 became the Judicial Authority Law.³⁷⁴ The Supreme Constitutional Court maintains that judicial independence is the main foundation of the supremacy of the law. It states “the meaning and the effects of judicial independence are not only a guarantee against interference of the executive authority in justice affairs, but it is also a guarantee against executive interference in its administration. Judicial Independence is introduction to the supremacy of law.”³⁷⁵

The 2013 Constitution confirmed judicial independence. Article 94 states “the state is subject to the law, while the independence, immunity and impartiality of the judiciary are essential guarantees for the protection of rights and freedoms.”³⁷⁶ Judicial independence is also addressed in section three under the title “the judicial authority.” Article 186 of the constitution maintains a separate article to ensure the judicial independence.³⁷⁷ Judicial institutes in Egypt are still a complicated issue, especially after the formulation of the present constitution. Each one of them was granted independence from the executive authority. These institutes are the Supreme Constitutional Court, the State Council, the Public Prosecution Bureau, the Military Judiciary, Administrative Prosecution, State Cases Authority, and aides to the Judiciary. This independence is not yet represented in the law of each of these current authorities

³⁶⁹ Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 I. DAYTON L. REV. 565 (1995-1996), 571

³⁷⁰ *Id* at 567

³⁷¹ *Id* at 566

³⁷² *Id*

³⁷³ *Id*

³⁷⁴ Judicial Independence Law 1943 and Judicial Independence Law 1952.

³⁷⁵ 27-16 J EGYPT SCC 671 (1995)

³⁷⁶ § 94 EGYPT CONST. (2013)

³⁷⁷ § 186 EGYPT CONST (2014) states that Judges are independent, cannot be dismissed, are subject to no other authority by the law, and are equal in rights and duties. The conditions and procedures for their appointment, secondment, delegation, discipline and retirement are regulated by law. They [Judges? Or the judicial power?] may not be fully or partly delegated except to bodies and to perform tasks that are identified by law, provided that all the foregoing maintains the independence and impartiality of the judiciary and judges and prevents conflicts of interest. The rights, duties and guarantees granted to them are specified by law.

The 2014 Constitution takes a similar approach to 2013 Constitution in regards to judicial independence.³⁷⁸ On the other hand, it takes a different understanding of the separation of power between judiciary and other authorities. Such separation ignores any form of checks and balances between these authorities. Besides banning any form of interference in the judicial affairs,³⁷⁹ it monopolizes the accountability and appointment of its members, which are presented in later chapters.³⁸⁰

This chapter is divided into three main sections. The first section discusses judicial independence in Egypt, while the second section discusses judicial independence in the comparative context. There are three major features of judicial independence: 1) judicial independence on the bench, 2) judicial independence of the institute, and 3) the role of separation of power between judicial and executive branches. The third section of the chapter is about the proposed reform to the issues of judicial independence and separation of power in Egypt.

II. Judicial Independence in Egypt:

A. Present State of the Judicial Independence in Egypt

The Supreme Constitutional Court (hereinafter SCC) has exclusive jurisdiction over issues related to the constitutionality of law and regulation, the interpretation of legislative texts, and issues pertaining to conflict of law.³⁸¹ As mentioned in an earlier chapter, it was established in 1978. It is a judicial institute independent from other judicial institutes.³⁸² It has its own law—Code No. 48/1979—that regulates its function. The rules regulating the judicial independence and judicial accountability of the court are similar to the Court of Cassation’s rules.³⁸³

SCC was built to replace the Supreme Court, which specialized in constitutional disputes.³⁸⁴ The latter court was established in 1969 to prevent the ordinary courts, represented in the Court of Cassation, from dealing with constitutional disputes. Nasser’s regime at that time wanted to ensure full power over such disputes. This can be clearly seen in the articulation of Article 7 of the Supreme Court Law (hereinafter SCL), which states, “the President of the Republic nominates the Chief Justice of the Supreme Court from the members of the Court or from elsewhere, as long as they fulfill the terms and condition of the nomination according to the previous article, with disregard to any age.”³⁸⁵ The article then further set the rules of choosing the members of the court. It states that “the President of the

³⁷⁸ § 184 EGYPT CONST (2014) states that the judiciary is independent. It is vested in the courts of justice of different types and degrees, which issue their judgments in accordance with the law. Its powers are defined by law. Interference in judicial affairs or in proceedings is a crime to which no statute of limitations may be applied.

³⁷⁹ § 185 EGYPT CONST (2014)

³⁸⁰ § 189 EGYPT CONST (2014) eliminates any form of interference of the executive in the prosecution. It states that “ Public prosecution is carried out by a Prosecutor General who is selected by the Supreme Judicial Council from among the Deputies to the President of the Court of Cassation, the Presidents of the Court of Appeals or the Assistant Prosecutor Generals, by virtue of a presidential decree for a period of four years, or for the period remaining until retirement age, whichever comes first, and only once during a judge’s career. See *also* §186, which states that Judges are independent, cannot be dismissed, are subject to no other authority but the law, and are equal in rights and duties. The law regulates the conditions and procedures for their appointment, secondment, delegation and retirement. It also regulates their disciplinary accountability.

³⁸¹ SCCC § 25

³⁸² SCCC § 1

³⁸³ SCCC § 2

³⁸⁴ SCCC § 14

³⁸⁵ SCL § 2

Republic nominates the vice-presidents and the Chancellors of the Court, after the consultation with the Supreme Council of the Judicial Institutions.”³⁸⁶

The present constitution maintains independence of both the judges on the bench, and the judiciary more broadly. The constitution grants judicial independence in the form of administration, budget, and personnel. Article 184 states that the “judiciary is independent. It is vested in the courts of justice of different types and degrees, which issue their judgment in accordance with the law. Its powers are defined by law.”³⁸⁷ As for the independence of administration, article 185 states that “all judicial bodies administer their own affairs.”³⁸⁸

As for the independent budget, the same article, paragraph 2 states “each -judicial body- has an independent budget, whose items are all discussed by the House of Representatives. After approving each budget, it is incorporated in the state budget as a single figure, and their opinion is consulted on the draft laws governing their affairs.”³⁸⁹ As for the independence of the judges on the bench, the constitution sets the general rule related to such independence in article 186.³⁹⁰

Even though the constitution has granted full independence to the judicial body, in reality this independence is not absolute. In developed countries, independence is not absolute due to the typically enforced principle of separation of power. In such relation, each power plays its role in the checks and balances to maintain full independence of each power. However, the Minister of Justice authorities in Egypt are a hurdle to the judicial independence. The minister plays the main role in choosing members of the judiciary, their promotion, accountability, nomination of the chairpersons of primary courts, which is the core of the ordinary judiciary. This role will be further discussed in the next few sections.

B. Judicial Independence: Independence on Bench in Egypt

Members of the judiciary are irremovable. This rule applies to all four judicial institutes. Article 11 of the SCC maintains that members of the court are irremovable. Furthermore, they cannot be transferred to another position without their approval.³⁹¹ The age of retirement of judges, who are members of the Ordinary Judiciary, is 70.³⁹² This age has vacillated between 60 and 70 several times. During this period, judges cannot be removed from their position, unless they voluntarily resign, or are dismissed as a result of disciplinary action. The Judicial Authority manages the two ways that judges can be removed from office. The first way is impeachment, which will be discussed in the following chapter. The second is resignation, in which case the law provides for full retirement benefits for life in case they wish to cease their appointment as judges.

Members of the Public Prosecution Bureau also follow the same rules as ordinary judges. Unlike most global legal systems, the public prosecution is an integral part of the judiciary in Egypt.³⁹³ This means that members of the prosecution bureau enjoy the same rights and responsibilities of members of the judiciary. The only exception of this rule is the position of the “aide to district attorney.” Prosecutors at this rank can be dismissed from office with decision from the attorney general.

The SCC does mention any form of immunity for its members. They enjoy the same immunity of the members of the Court of Cassation. Article 15 extends protection granted to members of the Court of

³⁸⁶ SCL § 2

³⁸⁷ EGYPT CONST. § 184

³⁸⁸ EGYPT CONST. § 185/1

³⁸⁹ EGYPT CONST. § 185/2

³⁹⁰ EGYPT CONST. § 186

³⁹¹ SCC § 11

³⁹² JAL § 69

³⁹³ EGYPT CONST. § 189

Cassation to the members of the SCC.³⁹⁴ Members of the court (chief justice, associate justices, or the commissioners) are irremovable from their offices. They cannot be transferred from their positions without their own approval.³⁹⁵

Judges and prosecutors who are members of the Ordinary Judiciary enjoy similar immunity. In case of committing a crime, judges cannot be arrested or stay in remand unless the Supreme Judicial Council issues a warrant for their arrest. The Council has the right to issue the warrant to arrest any judge if members of the council ascertain a violation of criminal law. Article 96 regulates such rights. It states that judges cannot be arrested or stay in remand, with exception to two cases. Firstly, if the judge caught while committing the crime, there is no need to await a warrant for his/her arrest. Secondly, if there is a strong belief that a judge has committed a crime, the attorney general has to take the permission of the Supreme Judicial Council to arrest him. After finishing the investigation with the judge about the charges, the Supreme Judicial Council is the competent authority to decide whether to maintain him in custody or bail or release the judge.³⁹⁶

In case the judge is taken into custody, he would be on mandatory leave during his custody period. This leave would prevent any judge from performing judicial duties. If the SJC decides to release the judge, he would be in a mandatory suspension until the end of the investigation and trial. During such time, he cannot execute his duties as a judge. However, the judge, who is either in custody or suspended, would still get his salary during the suspension or custody period.³⁹⁷ As for members of the Public Prosecution Bureau, they enjoy the same rights and privileges of the judiciary concerning immunity. Article 67 of the JAL states “members of the judiciary and public prosecution- except aids to district attorney- are irremovable. Judges of the court of cassation cannot be transferred to court of appeal or public prosecution unless they agree.”³⁹⁸

C. Judicial Independence: Institutional Independence

1. Judicial administration

The 2014 Constitution ensures judicial independence of the SCC.³⁹⁹ This ensures independence of the seat, budget and the general assembly, which would be presented in the formulation of the SCC. The SCC consists of three main bodies. **The first body** is the Chief Justice of the court, who is the head of the court. Unlike the Chief Justice of the US Supreme Court, he has supervisory authority over other members. This will be discussed later, in the section addressing disciplinary action by the court against any of its members. Moreover, the president of the SCC has many other constitutional functions, including impeachment. In case of impeachment of the president, the head of the Special Tribunal to prosecute the president would be the Chief Justice of the SCC.⁴⁰⁰ In the case of both the vacancy of the president and the dismemberment of parliament, the chief Justice takes charge of the country until the nomination of a new president.⁴⁰¹ The Chief Justice of the Supreme Constitutional Court Adly Mansour replaced President Mohamed Morsi as the interim president after the military coup of July 2013.⁴⁰² He

³⁹⁴ SCC § 24

³⁹⁵ SCC § 24

³⁹⁶ JAL § 97

³⁹⁷ JAL § 97

³⁹⁸ JAL § 97

³⁹⁹ EGYPT CONST. § 191, Article 191 states that “[t]he Supreme Constitutional Court is an independent judicial body... [I]t has independent budget, the items of which are discussed by the House of Representatives, after it is approved, it is incorporated in the state budget as a single figure.”

⁴⁰⁰ EGYPT CONST. § 159/3

⁴⁰¹ EGYPT CONST. § 160/3

⁴⁰² Profile: Interim Egyptian President Adly Mansour, Middle East, BBC (4 July 2013) <http://www.bbc.com/news/world-middle-east-23176293>

ruled Egypt for nine months, until Field Marshall Abdel Fatah al-Sisi won the presidential elections in March 2014.⁴⁰³

The second body is public assembly, which is responsible for the administrative affairs of the court. As stated in the constitution, the public assembly is ‘responsible for governing the Court’s affairs, and is consulted on draft laws related to the Court’s affairs.’⁴⁰⁴ The public assembly also has additional functions. Article 144 of the constitution states “[i]n case of the absence of the house of Representatives, the oath is to be taken before the General Assembly of the Supreme Constitutional Court.”⁴⁰⁵ It is also the institute that is in charge of accepting the resignation of the president, in case the People’s Assembly is dissolved.⁴⁰⁶

The third body is the commissioner authority, which consists of “the president and a sufficient number of presidents in the authority, advisors and assistant advisors.”⁴⁰⁷ Members of the commission are ranked as Chancellors.⁴⁰⁸ Their role is to prepare the cases. They have the right to contact any governmental or non-governmental entities in the country to request information about some cases.⁴⁰⁹ It plays the role of the investigator in the case, in order to right a report or opinion to the court about the current issue.⁴¹⁰ In that report, the commission shall present the constitutional and legal issues presented in the case, and it shall present also its opinion in them.⁴¹¹ The court has jurisdiction over certain types of cases. The constitution draws the general line of the jurisdiction of the court, while the Supreme Constitutional Court Law draws the details.⁴¹² In short, the SCC is responsible for answering the following issues: Judicial supervision over constitutionality of law and regulations (art. 25),⁴¹³ conflict of law and conflict of jurisdiction among judicial institutions (art. 25),⁴¹⁴ conflict raised as a result of contradictory judgments from two different judicial institutions (art. 25),⁴¹⁵ interpretation of the laws and regulations (art. 26),⁴¹⁶ and unification of the interpretation of laws (art. 26).⁴¹⁷ Figure 1 presents the entities of the Supreme Constitutional Court, and their main functions:

Figure (1)

⁴⁰³ Egypt Abdel Fattah al-Sisi Profile, New BBC (16 May 2014)(<http://www.bbc.com/news/world-middle-east-19256730>)

⁴⁰⁴ EGYPT CONST. § 191

⁴⁰⁵ EGYPT CONST. § 144

⁴⁰⁶ EGYPT CONST. § 158

⁴⁰⁷ EGYPT CONST. § 193/2

⁴⁰⁸ SCC § 41

⁴⁰⁹ SCC § 39

⁴¹⁰ SCC § 40

⁴¹¹ SCC § 40

⁴¹² EGYPT CONST. § 192, Article 192 of the constitution states that the court is: exclusively competent to decide on the constitutionality of laws and regulations, interpret legislative texts, and adjudicate in disputes pertaining to the affairs of its members, in disputes between judicial bodies and entities that have judicial mandate, in disputes pertaining to the implementation of two final contradictory rulings, one of which is issued by any judicial body or an agency with judicial mandate and the other issued by another body, and in disputes pertaining to the implementation of its rulings and decisions

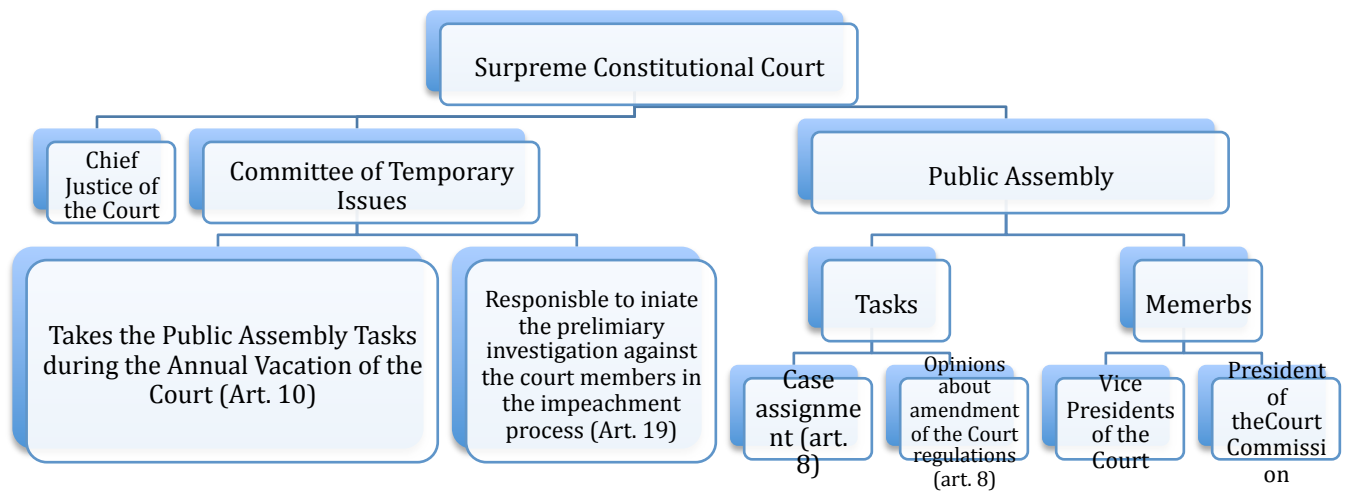
⁴¹³ SCC § 25

⁴¹⁴ SCC § 25

⁴¹⁵ SCC § 25

⁴¹⁶ SCC § 26

⁴¹⁷ SCC § 26



The ordinary courts, as a rule, are specialized in all types of law except the administrative law. Article 188 of the constitution states “the judiciary adjudicates all disputes and crimes except for matters over which another judiciary body is competent.”⁴¹⁸ Article 15 of the Judicial Authority Law (JAL) states that (Ordinary) Courts are competent with every type of dispute and crimes, with the exception of the administrative disputes. Such disputes fall under the jurisdictions of the State Council, or otherwise any special law. Both the law of criminal procedures and civil procedures set the ground rules for such jurisdiction.⁴¹⁹

The ordinary court adjudication is founded, like the French system, on two levels. The partial court cases can be appealed in competent primary courts, while primary court cases can be appealed in the Competent Court of appeal. As for the Court of Cassation, it is a court of law, not a court of facts.⁴²⁰ Hence, as Article 1 of the JAL states: there are four judicial bodies within the boundaries of the ordinary court, which are the partial court, primary court, appeal court, and the Court of Cassation.⁴²¹

The Court of Cassation is at the top of the pyramid. The work of the Court of Cassation is based on the principle of seniority. The most senior member takes charge of the court. As a consequence of retirement age, the period of the presidency of the court is just one year. It starts in October and ends in the last day of September of the following year. The president of the Court of Cassation also serves as president of the Supreme Judicial Council. Within the Court of Cassation, there are two main committees, which are considered the public assembly of the court.⁴²² The first specializes in criminal cases, while the second specializes in “civil, commercial, family or any other types of laws.”⁴²³

There is another unit attached to the Court of Cassation called the Court of Cassation Technical Office. This office is specialized in administrative affairs of the court. Article 5 states that it specializes in “supervision of the case row of the court, present similar and connected cases, or these cases that need single legal principle to execute a judgment.”⁴²⁴ The minister of justice also plays a great role here. He

⁴¹⁸ EGYPT CONST. § 191

⁴¹⁹ JAL § 15

⁴²⁰ JAL § 15

⁴²¹ JAL § 1

⁴²² JAL § 3

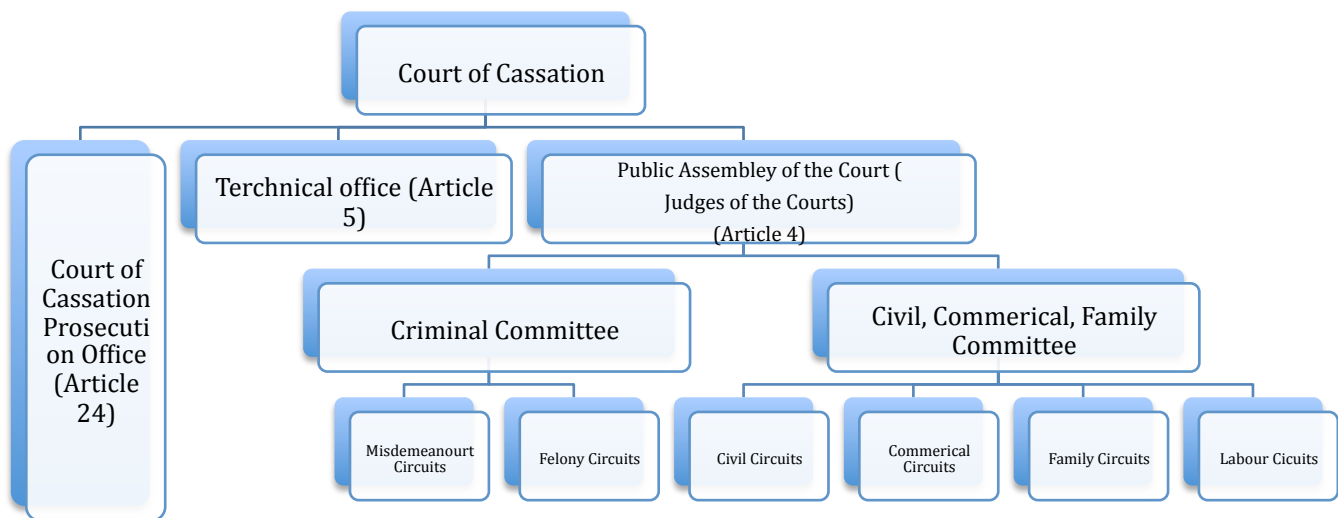
⁴²³ JAL § 4

⁴²⁴ JAL § 5

is responsible for nominating the Chairperson of the Technical Office. The same article states “the Minister of Justice is responsible for assigning the chairperson and members of Technical Office for a renewable term of one year. This assignment is subject to the acceptance of the judicial council, and the nomination to the president of the court of cassation.”⁴²⁵ Figure 2 shows the hierarchy of the Court of Cassation.

Due to the lack of a serious separation of power, as shown later in this chapter, all the ministers of justice in Egypt shall be members of the ordinary judiciary. In the past ten years, six justices took the position of the minister of justice. Three out of six were members of Court of Cassation, while the other three were members of the Cairo Court of Appeal. These judges, who were members of the Court of Cassation and became ministers of justice, are Neir Osman (the ex-vice president of Court of Cassation, February 2014- Present), Adel Abdel Hamid (ex-president of Court of Cassation, July 2013- February 2014 and December 2011- August 2012), and Ahmed Mikky (ex-vice president of Court of Cassation, August 2012- May 2013).

Figure (2)



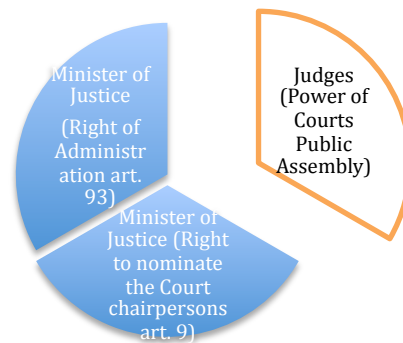
The establishment of the court of appeal must be through a legislative amendment.⁴²⁶ There used to be six courts of appeals, which are Cairo, Alexandria, Tanta, Mansoura, Ismailia, Beni-Suef, Assuit, and Qena. The judges of the courts of appeal are all ranked as chancellor. Seniority is the main principle that governs the nomination of the chairperson to these courts. Article 93 of the Judicial Authority Law used to grant the Minister of Justice the right to supervise all the courts and judges. The president of each court and its public assembly had the right to supervise the judges of such court. This article was amended in 2006, with the new amendment eliminating the authority of the Ministry of Justice over judicial supervision, while maintaining its direct supervision over the administration of the court.⁴²⁷

⁴²⁵ JAL § 5

⁴²⁶ JAL § 10

⁴²⁷ JAL § 93 states that “the minister of justice has the right to administrative supervision over the courts, and the president of each court and its public assembly has the right to supervision.”

Figure (3): The Minister of Justice role in justice administration in Primary Court



Article 9 of the JAL states that the Minister of Justice has the right to nominate the chairperson of the primary courts, with the approval of the Supreme Judicial Council, for a renewable term of one year.⁴²⁸ Hence, the Minister of Justice is allowed two thirds of the administration of the court in Egypt. The first third is through this role as a minister of justice, where he/she has the right to administer the courts. The second third is represented in his right to nominate the names of the chairperson of the primary courts. Figure 3 shows the relationship of the MoJ in justice administration on the primary court level.

There are two types of supervision: administrative and judicial. The first type is clearly given to the Minister of Justice, who is a member of the government. The second type is for the chairperson of the court and the public assembly. First of all, for the public assembly, it is impractical to demand the assembly to convene on regular basis to discuss certain issues. Each primary court consists of judges and chancellors. While judges work three days a week (Saturday to Monday, or Tuesday to Thursday), Chancellors work only one week per month. It is rather hard to coordinate their schedules, unless for an exceptionally urgent matter. As a result, a tradition came up that these assemblies delegate their power to the Chairperson of the court. This delegation occurs in the first day of each new judicial year, starting in October.

Secondly comes the question of the entity that has the right to nominate each primary court president or chairperson. In practice, this person has full authority to administer both judicial and administrative supervision of the court. As for the judicial administration, he draws this power from the practice of courts to delegate this power. As for the administrative power over courts, he maintains his power from the power of the Minister of Justice, who has the authority to nominate him from the first place.⁴²⁹

Partial courts consist of judges, not chancellors. The formulation of the circuits in partial courts is released from one judge.⁴³⁰ These judges are not specialized in a certain type of law. They can be assigned to any type of case within their jurisdictions. Article 12 gives the right for the judge to ask for a specialization after four years of his nomination.⁴³¹ However, this article is not enforced. First, the limited number of judges compared to that of the number of cases constrains the opportunity for specialization. Secondly, the minister of justice has the authority to set the rules of judges'

⁴²⁸ JAL § 9

⁴²⁹ JAL § 9 states that "Each (primary) court is made up of an adequate number of judges and chancellors. A judge from the appeal court is nominated to be its presidency... The Minister of Justice issues the nomination decree after the acceptance of the Supreme Judicial Council of such nomination. The duration of the nomination is for a renewable period of one year."

⁴³⁰ JAL § 14

⁴³¹ JAL § 93

specializations, a practice that is rarely done. It is in the Minister of Justice's interest to maintain the *status-quo* in order to maintain his influence over the judges. The Minister of Justice wants to ensure that judges comply with his rule. He, through the chairperson of the court, assigns judges to certain types of cases. Some judges are well known to have a certain inclination to work in certain cases. The reason for doing this is to put them under pressure to show loyalty to the chairperson, in order to transfer them to better districts or to assign them to their specialized areas of law. Responsibilities of the prosecution bureau are established in Article 189 of the Constitution. It states that the prosecution bureau is responsible for "investigating, pressing charges and prosecuting all criminal cases except what is exempted by law. The law establishes the public prosecution's other competencies."⁴³²

In the past, and until 2013, the selection of the Attorney General, which is different than that of the Minister of Justice, was under the sole discretion of the President of the Country. Article 119 of the present JAL states "the President of the Republic nominates the Attorney General, from judges of the Courts of Appeal, judges of Court of Cassation, or the Senior District Attorneys at least." However, the present Attorney General, Chancellor Hesham Barakat, was not nominated based on this article. He was appointed in 2013. His nomination was based on the new Constitution, which held new procedures to appoint the Attorney General.⁴³³

2. Case Assignment

As for the SCC, the court does not hear any oral arguments, unless it chooses to. Otherwise, the court depends on the motions and memos submitted from the parties of the case.⁴³⁴ It is the responsibility of the Public Assembly to assign cases. However, the SCC can grant certiorari in two cases. Firstly, the SCC would accept a case from a judicial entity like the courts, the State Council or arbitrary tribunal. In this case, if such an entity identifies a likelihood of unconstitutionality of a certain law, it shall transfer the issue to the SCC to settle the question of the constitutionality.⁴³⁵ Secondly, if a claiming party in disputes that certain law is unconstitutional, the court transfers the claim to the SCC. However, this right is not unlimited. The competent court shall find validity to the claim based on unconstitutional basis.⁴³⁶

As for the ordinary courts, the case assignment issue varies based on the type of the court. The most concrete rules of case assignment are found in the ordinary courts. In the remaining types of courts, the authority of the president of the court influences such assignment, as will be shown in later paragraphs. There are three types of case assignment methods, which are adopted in the administration of justice in Egypt. The first type is case assignment based on jurisdiction. In this type, each case either has monetary jurisdiction, spatial jurisdiction, or personal jurisdiction. Each court has its monetary jurisdiction limit. This is usually in civil or commercial cases. For instance, the monetary limit of partial courts is less than 10,000 Egyptian Pounds, while the monetary limit of the primary court is greater than 10,000 Egyptian Pounds. As for the special jurisdiction, each court is specialized in cases that take place within its domain. If a crime occurs in District A, it is not of interest to District B. There is only one exception to this rule, which is the necessity to transfer the trial from District A to District B.⁴³⁷ The competent judge would be responsible for determining such necessity.

⁴³² EGYPT CONST. § 189/1

⁴³³ EGYPT CONST. § 189/1, it states that Public prosecution is carried out by a Prosecutor General who is selected by the Supreme Judicial Council from among the Deputies to the President of the Court of Cassation, the Presidents of the Court of Appeals or the Assistant Prosecutor Generals, by virtue of a presidential decree for a period of four years, or for the period remaining until retirement age, whichever comes first, and only once during a judge's career.

⁴³⁴ SCC § 44

⁴³⁵ SCC § 29/1

⁴³⁶ SCC § 29/2

⁴³⁷ JAL § 11

The second type of case is a debatable issue in the Egyptian judiciary, especially in the lower courts. This debate is related to the unclear rules related to specialization of judges of the lower courts. Many judges have thousands of cases each month to review.⁴³⁸ Each court and prosecution office sends to the Ministry of Justice either monthly or bi-annual reports detailing the number of cases and their types. However, the Ministry of Justice refuses to announce these numbers to the public. For some reason the ministry of justice also lacks transparency due to its refusal to expose these numbers. With the absence of official records, I would have to say that I have worked in some court sessions with judges who have to finish about 500 cases in one day. Usually, the average caseload in misdemeanor court ranges between 150-250 per day. In the Felony court, the average would be around 25-40 cases per day.

This problem is also related to the prosecution bureau. There are no specialization rules related to the prosecutors. Unlike prosecutors in the United States, prosecutors in Egypt deal with all types of cases. This is due to two reasons. First, there is limited number of prosecutors compared to the number of cases. In Districts like Santa Clara, California, there are about 45,000 cases a year. There is also about 188 prosecutors and more than 500 employees in that district.⁴³⁹ In a district like Embaba, Giza, there are about 50, 000 cases a year. There are also about 12 prosecutors and 35 employees.

The Third type is based on the number of cases prosecuted. Each case has a judicial number. Each judge or each circuit is assigned to a certain number. For example, if there are five judges working in criminal cases in a certain district, each judge will be assigned two “judicial numbers.” Hence, the distribution of cases would be as follows: Judge 1 – most senior judge- would take cases ending with judicial number 0 and 1. Judge 2 – second senior - would take cases ending with judicial number 2 and 3, Judge 3 would take cases ending with judicial number 4 and 5, Judge 4 would take cases ending with judicial number 6 and 7, and Judge 5 – most junior- would take cases ending with judicial number 8 and 9. This way of distributing cases has become a tradition in the judiciary work in the courts. Each year, the Public Assembly distributes the numbers based on seniority of the members of the office.

3. Remuneration

Article 12 states the rules determining salaries of members of the judiciary based on a table (attached below).⁴⁴⁰ All courts enjoy full independence over any dispute regarding the salaries of court members.⁴⁴¹ It has the right to determine the compensation and the salaries of its members based on the table of salaries attached to the law. Article 68 of the Judicial Authority Law regulates the salaries of prosecutors, judges and chancellors. It states that their salaries shall be in accordance with the table attached to the law. No judge can receive any salary on personal or exceptional basis.⁴⁴² As the age of the retirement is 70,⁴⁴³ judges receive monetary compensation from their retirement plan at the age of 60. The ten years between the ages of 60 to 70 are not part of the retirement plan. The reason is that the age of 70 was never the age of retirement of judges. It increases from 60 to 65, then from 65 to 67, and finally 67 to 70. The government wanted to increase the age for political reasons, without increasing the burden of insuring them during these years. The following table shows the difference between current and actual annual salaries in the table attached to the law.

Figure (4)

⁴³⁸ The Egyptian Legal System, Golbal Ethics Observatory, Legislation and guidelines, UNESCO, <http://www.unesco.org/shs/ethics/geo/user/?action=Geo4Country&db=GEO4&id=9&lng=en>

⁴³⁹ Office of the District Attorney, County of Santa Clara, (2014) <http://www.sccgov.org/sites/da/aboutus/Pages/faq.aspx>

⁴⁴⁰ SCC § 12

⁴⁴¹ SCC § 16

⁴⁴² JAL § 68

⁴⁴³ JAL § 69

Table: *Wages of the Judiciary in US Dollars*:⁴⁴⁴

Judicial Rank	Annual Basic Wage	Annual Actual Wage
Head of Court of Cassation	2,876	22,226
Head of the Court of Appeal	2,320-2,868	17,582.4
Head of First Instance Court	1,308-2364	8,890-11,113
Judge	1,080-1868	8,791.2
Prosecutor	780-1,464	6,593

4. Resources

As for the Supreme Constitutional Court, Article 18 of the SCCL tackles financial independence of the court through an independent body attached to the court. This body is responsible for maintaining the necessary fund for salaries, health insurance, and social activities of the members of the court and its commissioners.⁴⁴⁵

As for the Ordinary Courts and Public Prosecution Bureau, the constitution maintains independence of the budget of judicial bodies. The ordinary court, like other judicial institutions, has its own budget. The Public Prosecution unit in each partial, primary or appeal court is responsible for supervising all financial issues of the court. Article 28 of the JAL states that Public Prosecution takes over the supervision of the issue related to court expenditure.⁴⁴⁶ The source of revenue for the courts comes from fines, fees, and bails, which is also handled by the Prosecution office. Article 29 states that fines and other types of fees required in criminal, civil, or personal status (family law), as well as deposits and safe-boxes shall be collected, saved and spent by court employees under direct supervision of both the Public Prosecution Bureau and the Minister of Justice.⁴⁴⁷

D. The Issue of Separation of Power in Egypt

Until the formulation of the Constitution of 2013, the successive Egyptian constitutions did not mention the principle of separation of power explicitly.⁴⁴⁸ It was the rule of the judiciary to set the boundaries between the state authorities. The Supreme Administrative Court based the principle of separation of power on Article 23 of Constitution of 1923. This article states “People are the source of all authorities, and the execution of authorities shall follow the rule of constitution.”

In 1923, it was hard to say that there was a separation of power. Under the monarchical system, all power lies in the hands of the king. It is enough to read three articles of the constitution to know that there are only two competing authorities, which are reflected in the current situation of the country. Firstly, Article 24 of the Constitution 1923, delegates the legislative authority to the King in collaboration with both parliaments. Secondly, Article 29 delegates the head of the executive authority

⁴⁴⁴ Nora Elbially and Miguel A. Garcia- Rubio, *Assessing Judicial Efficiency of Egyptian First Instance Courts A DEA Analysis, (2011)* (https://www.uni-marburg.de/fb02/makro/forschung/magkspapers/19-2011_elbially.pdf)

⁴⁴⁵ SCC § 18

⁴⁴⁶ JAL § 28

⁴⁴⁷ JAL § 29

⁴⁴⁸ Yossri El Assar, *Al-Ta'lik ala Ahkam al-Mahkamah El Dostorayah bayan al-Mawdow 'yah al-almayah we-al-hawa al-sayasi*, 13 al-Dostorayah (2014) (<http://hccourt.gov.eg/Pages/elmglacourt/mkal/23/mohmed%20el%20asar.htm>)

to the King. Thirdly, Article 30 delegates the judicial authority to the courts. Hence, the separation that the Supreme Administrative Court meant at that time was the separation between the King and the Courts.

In the last 10 years, the separation of powers also means the separation between the head of the executive authority and the judiciary. The legislative authority was always a representative to the government in power, due to the lack of political pluralism. Three Parliaments have been sworn in as legislative bodies since 2005. They represent the conflict between Military figures and Islamist. The first legislative one was from the period between 2005 and 2010. The National Democratic Party, which was the dominant party, won the election of the People's Assembly for this period. It took the majority with a percentage of 82%.⁴⁴⁹ The president of this political party was Hosni Mubarak, who was also the president of the country. The Muslim Brotherhood came in second place with 76 seats out of 454.⁴⁵⁰ The New al-Wafd Party came in third with total number 6 seats.⁴⁵¹

The second election was in November 2010. The National Democratic Party won more than 95% of the total seats in the People's Assembly. The second place this time went to the new *al-Wafd* Party, which took only five seats out of 454. There was an allegation of election fraud from all the political parties against the National Democratic Party.⁴⁵² However, this allegation was never investigated or prosecuted, even though the main victim of this crime came to the authority in 2012. The period of this parliament was very short. It was dissolved directly after the 25 of January Revolution in 2011. The third election was held in 2015. The number of military generals in the current parliament is 71 military general.⁴⁵³

The improper influence on judicial decision-making takes – in the majority of cases – two forms. Firstly, the Minister of Justice power to appoint the president of the primary courts. The right of the minister of justice is a legal right that is mentioned in the judicial authority law. However, this right has been commonly and continuously misused. This right gives the Ministry of Justice the upper hand in choosing the president of the primary courts, who has the right to assign judges to certain circuits. Each court has circuits that are specialized in certain types of cases – like high value commercial cases or cases with political nature – that are called sensitive cases. They are called sensitive due to the nature of the parties in these cases.

The sensitive circuits are assigned to certain judges whose tendencies in certain types of cases are known.⁴⁵⁴ In 2012, Chancellor *Mahmoud Shokri* was the judge of a case called “illegal foreign fund against NGOs.” He was forced to resign from the cases because he refused to follow the request of the president of the Cairo court of appeals, Chancellor *Abdel Moez Ibrahim*.⁴⁵⁵ The case was assigned to

⁴⁴⁹ Yoram Meital, *The Struggle over Political Order in Egypt: The 2005 Election*, 60 MIDDLE EAST J. 257 (2006), 257.

⁴⁵⁰ Sharon Otterman, Muslim Brotherhood and Egypt's Parliamentary Elections, (December 2005)

(<http://www.cfr.org/egypt/muslim-brotherhood-egypts-parliamentary-elections/p9319>)

⁴⁵¹ Wafed Party (2011) (<http://english.ahram.org.eg/NewsContent/33/104/24940/Elections-/Political-Parties/Wafd-party.aspx>)

⁴⁵² Egypt elections: al-Wafed Party, Carnegie Endowment for International Peace, (2011)

<http://www.aucegypt.edu/gapp/cairereview/pages/articleDetails.aspx?aid=104>

⁴⁵³ *Belasma' .. ta'araf 'al 71 lawa jaysh we-mokhabarat fi albarlaman al- 'skari, nafazat Parlamen*, {December 5, 2015},

http://old.egyptwindow.net/news_Details.aspx?News_ID=90772

⁴⁵⁴ The successive ministers of justice used to deny the existence of such interference. In that regard, Yussef Auf, Challenges Facing Egypt's Judiciary, Middle East Institute, {May, 01, 2013}, <http://www.mideasti.org/content/challenges-facing-egypts-judiciary>

⁴⁵⁵ Al-Mostashar Mahmoud Shokri Yabki 'al hal alqodah ma' Mahmoud Said, YouTube {March 28, 2912}, https://www.youtube.com/watch?v=iZ0v_MXkB44

one of the judges in the technical office of the court. As a consequence of such action, some judges moved to sack Chancellor Ibrahim, but they were not successful.⁴⁵⁶

Secondly, the Minister of Justice has the ultimate power over the judicial inspection department. This is also a legal right.⁴⁵⁷ The constitution of 2014 gives the judiciary the right to regulate the accountability rules of its members.⁴⁵⁸ The problem with the inspection department and the Ministry of Justice lies in the arbitrary nature of its decisions. This arbitrariness was clear after the military coup in 2013. Many judges supported the coup, while other judges supported ex-president Mohamed Morsi. Even though both groups have committed the same violation of the judicial authority law of banning the political participation of the judiciary, the inspection department impeached many of the judges who supported ex-president Mohamed Morsi but forgave all judges who supported the military coup.⁴⁵⁹

III. Application of Judicial Independence and Separation of Power

A. Judicial Independence in the United States:

Judicial independence is largely made up of the history of the United States Constitution. It is part of the collective history of drafting the Constitution. A brief background is important to understand the current literature of judicial independence in the United States. In the *Federalist no. LXXVIII*, Hamilton maintained the importance of the independent judiciary and the reason for that. He states:

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill-humors which the arts of designing men or the influence of particular conjunctures sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.⁴⁶⁰

Judicial independence is a cornerstone of the US legal system. It is regulated under several provisions of the United States Constitution. These provisions are related to judicial compensation (Compensation Clause), the tenure office and immunity of judges (the Tenure Clause), judicial selection (the Appointments Clause).⁴⁶¹ This section is limited to the Compensation Clause and the Tenure Clause, while the appointment clause is discussed in a later chapter.

The **Compensation Clause** states that “judges, both of the supreme and inferior Courts, shall receive compensation for their services.”⁴⁶² And the **Tenure Clause and the Doctrine of Judicial Immunity** states that “judges of the Supreme and Inferior Courts, shall hold their offices during good behavior.”⁴⁶³

The **Appointment Clause** provides the method of nominating federal judges. It states “the president shall nominate, and by and with the advice and consent of the Senate, shall appoint ... Judges of the

⁴⁵⁶ Mai Shams al-Din, Appeals Court Judges move to sack Abdel Moez Ibrahim, Daily News Egypt, {March 23, 2012}, <http://www.dailynewsegypt.com/2012/03/23/appeals-court-judges-move-to-sack-abdel-moez-ibrahim/>

⁴⁵⁷ There were some endeavors to transfer the inspection department from the ministry of justice to the supreme judicial council during Chancellor Ahmed Mikky period as minister of justice.

⁴⁵⁸ EGYPT CONST (2014) § 184

⁴⁵⁹ Egypt refers 60 pro-brotherhood judges to disciplinary board, Ahram Online, {October 20, 2014}, <http://english.ahram.org.eg/NewsContent/1/64/113517/Egypt/Politics-/Egypt-refers--proBrotherhood-judges-to-disciplinar.aspx> ,

⁴⁶⁰ Alexander Hamilton, John Jay, and James Madison, *The Federalist: Collection of Essays*, 1 ALEXANDER HAMILTON ET AL. THE FEDERALIST A OF ESSAYS REV. ED.I. 1901, (1787), 432.

⁴⁶¹ Charles Cole, *Judicial Independence in the United States Federal Courts*, 13 J.L.PROF. 183 (1988), 187

⁴⁶² US Const. § III § 1

⁴⁶³ US Const. § III § 1

Supreme Court, and all other officers of the United States, whose appointment is not herein otherwise provided for, which shall be established by law.”⁴⁶⁴ As for federal district and circuit judges, they are nominated in the same manner of the Supreme Court Justices as “a matter of practice.”⁴⁶⁵ A detailed description of this process and its justification are presented in the nomination and appointment of judges.

Some brief points on the authority of the Congress over the judiciary: Firstly, the Congress has the authority to impeach members of the judiciary. However, it is not a common practice, with the exception of a few cases.⁴⁶⁶ Article III, section 1 of the constitution indicates that the only way of eliminating federal judges is through the process of impeachment.⁴⁶⁷

Secondly, the Congress follows its discretion to structure federal courts. However, the Congress offers them the ability to be autonomous.⁴⁶⁸ The Congress still has the right to set the budget and resources for the federal judiciary to ensure efficiency of the federal courts.⁴⁶⁹ Besides, the Congress has the ability to determine the workload of the judicial system.⁴⁷⁰ It has the right to create or eliminate judicial positions, or to decrease/increase the judicial budget; the judiciary has nothing to say about such rights.⁴⁷¹ Such power of the Congress over the federal judges and their budget, jurisdiction, structure, size, administration, and rulemaking is ending any form of autonomy to the US federal judges.⁴⁷² As such, the federal courts, as an institution, are not independent.

B. Judicial Independence in the United Kingdom

1. The Status of the Judicial Independence in the United Kingdom:

Before 1701, judges were delegates of the king in the courts. Judges could not decide in opposition of the king’s or queen’s will.⁴⁷³ The concept of judicial independence started in 1701 in England and Wales after the passing the Act of Settlement.⁴⁷⁴ This Act established for the first time the “principle of security of judicial tenure.”⁴⁷⁵ It gives the High Court Judges and Lords Justice of Appeal the right to maintain judges in office during “good behaviors.”⁴⁷⁶ A judge cannot be impeached from his position unless both the king and both houses of parliament agreed on such impeachment.⁴⁷⁷

On the other hand, the concept of an independent judiciary is not as old as its counterpart in the United States. The situation in the United Kingdom was not that easy with the existence of a strong monarch system that was very influential over the branches of the government. It was not yet enough to introduce such Act to prevent the king from interfering in the judiciary’s business.⁴⁷⁸ It took more than

⁴⁶⁴ US Const. § II § 2, cl. 2

⁴⁶⁵ Supra Note 461 at 201.

⁴⁶⁶ John Yoo, *Testimony of John Yoo before the Commission on Separation of Powers and Judicial Independence of the American Bar Association*, (1997)

⁴⁶⁷ *Id*

⁴⁶⁸ *Id*

⁴⁶⁹ *Id*

⁴⁷⁰ *Id*

⁴⁷¹ *Id*

⁴⁷² Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 *IND. L. J.* 153 (2003), 159

⁴⁷³ *Independence, Courts and Tribunal Judiciary*, (2014) <http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/independence/>

⁴⁷⁴ *Id*

⁴⁷⁵ *Id*

⁴⁷⁶ *Id*

⁴⁷⁷ *Id*

⁴⁷⁸ SHIMON SHETREET AND SOPHIE TURENNE, *JUDGES ON TRIAL: THE INDEPENDENCE AND ACCOUNTABILITY OF THE ENGLISH JUDICIARY* (2nd ed. 2013), 32

a century to settle the concept of judicial independence.⁴⁷⁹ The reason behind that delay was that the United Kingdom's constitution, still largely unwritten during that period, did not establish the separation of power like the constitution of the United States.⁴⁸⁰

The issue of the influence of the Crown over the judiciary was a push and pull strategy until the Constitutional Reform Act in 2005.⁴⁸¹ The significance of the 2005 Act lies in the fact that it was the first formal separation of powers between the three branches of the government.⁴⁸² The new reform abolished the existing form of organization to the judiciary in the land. It advocates abolishing the membership of senior judges in the House of Lords to establish a new Supreme Court of the UK.⁴⁸³

Following the Human Rights Act in 1998 and the Constitutional Reform Act in 2005, the judicial independence in the United Kingdom was completely reformed.⁴⁸⁴ Many topics were addressed in the structural reform of the judiciary to ensure independence, like administration of the judiciary, selection of judges, tenure and promotion, remuneration, case assignments, judicial accountability/discipline, budget, immunity, as well as judges' associations. This chapter is limited to discussing independence the judges. Case assignments, remuneration, and judiciary administration are some topics are closely related to independence of the judicial authority. On the other hand, tenure and immunity are the topics related to the independence of the individual judges or the bench.

2. Judicial Independence: Independence of the Bench

1) Tenure: the topic of the tenure track of the judiciary in the United Kingdom is divided into two main issues. While the first is the retirement age and impeachment, the second is the promotion of judges. Firstly, the age of retirement for High Court judges is 70 years old.⁴⁸⁵ They can hold the office as long as they are in "good behavioral standing." The only way of removing judges of similar rank is by direct order from the Queen, after both houses of Parliament pass an impeachment resolution.⁴⁸⁶ As for the judges of lower courts, even though the age of retirement for them is same, they can be removed from office on ground of "incapacity or misbehavior from the lord Chancellor."⁴⁸⁷

Secondly, the promotion of judges is the responsibility of the Judicial Appointments' Commission, which plays a major role in reducing the interference of the executive authority in regards to junior magistrates.⁴⁸⁸ Besides, this commission plays a vital role of judicial independence from the judiciary itself, especially senior judges.⁴⁸⁹ The reason behind that is the increase of executive responsibility of some judges over other junior judges in relation to the workload and allocation of case types.⁴⁹⁰

2) Immunity: Same as most of the jurisdictions, judges enjoy immunity as indicated "arising out of judicial proceedings."⁴⁹¹ This type of immunity applies in two cases, which are "i) acts in the *bona fide* exercise of his office; and ii) in the belief... that he has jurisdiction."⁴⁹² Another type of immunity is granted to the judiciary, which is personal civil liability. However, this type of immunity is not granted

⁴⁷⁹ *Id*

⁴⁸⁰ KATE MALLESON, *THE NEW JUDICIARY: THE EFFECTS OF EXPANSION AND ACTIVISM* (1999), 46

⁴⁸¹ *Supra* note 478 at 34

⁴⁸² *Id* 34

⁴⁸³ *Id* 35

⁴⁸⁴ Sophie Turenne, *Judicial Independence in England and Wales*, ANJA SEIBERT-FOHR (ED.), *JUDICIAL INDEPENDENCE IN TRANSITION* 147 (Springer 2012)

⁴⁸⁵ *Id* 164

⁴⁸⁶ Senior Courts Act 1981 § 11 (8 and 9)

⁴⁸⁷ Senior Courts Act 1981 § 17 (4)

⁴⁸⁸ *Supra* note 484 at 164

⁴⁸⁹ *Id* 164

⁴⁹⁰ *Id* 164

⁴⁹¹ *Id* 172

⁴⁹² *Id* 172

to all members of the judiciary. It is limited to the “judges of the High Court and the Court of Appeal.”⁴⁹³ Finally, a general rule to the immunity is that it shall be “in the honest belief that it is within [the Judge’s] jurisdiction.”⁴⁹⁴

3. Judicial Independence: Institutional independence

1) Judiciary administration takes the lion-share in the reform in London and Wales. Reform of judicial administration took two approaches. The first approach concerns the administration of the judiciary.⁴⁹⁵ The reform amalgamates the position of the Lord Chancellor and the Minister of Justice.⁴⁹⁶ The significance of these steps lies in the different methods of appointment between the Lord Chancellor and the Lord Chief Justice. While the first is politically appointed as a governmental minister, a special appointed committee from the judicial appointments commission chooses the second.⁴⁹⁷

The Constitutional Reform Act introduced a new position, that of Concordat.⁴⁹⁸ This position is to coordinate between the government and the judiciary, represented in the relationship between the Lord Chief Justice and Lord Chancellor.⁴⁹⁹ It was established after the debate on the difference between the Judges’ council, senior judges and the Department for Constitutional Affairs.⁵⁰⁰

The second form of administration in the United Kingdom is the Judges’ Council.⁵⁰¹ Its main function is to act as a “body representing the views and interest of each tier of the judiciary.”⁵⁰² It is not an institution of governance; rather, it is considered a forum.⁵⁰³ However, it functions as an important aspect in the English judiciary, like selecting three judicial members of the “Judicial appointments Commission,”⁵⁰⁴ and it is represented in each level of the United Kingdom judiciary.⁵⁰⁵

The Judges’ Council consists of 18 members, and the Lord Chief Justice is its chair, for a term of three years.⁵⁰⁶ Although they are not directly elected, they are chosen from elected association and councils within the judicial body.⁵⁰⁷

2) Case assignment is one of the most complicated issues in the United Kingdom. The fight between two main principles is not yet settled in this issue. These principles are: principle of continuity (same judge to same case), and the principle of efficiency of listing (judging in timely manner).⁵⁰⁸ Under the Concordat, the charged judge is the one responsible for determining “how and by whom each case is heard.”⁵⁰⁹

3) Remuneration (unlike the case of the United States), the government is responsible of determining salaries and level of remuneration of the judiciary.⁵¹⁰ The salary structure is based on the level of the

⁴⁹³ *Id* 172

⁴⁹⁴ *Id* 172

⁴⁹⁵ *Id* 149

⁴⁹⁶ *Id* 149

⁴⁹⁷ *Id* 149

⁴⁹⁸ *Id* 149

⁴⁹⁹ *Id* 149

⁵⁰⁰ *Id* 149

⁵⁰¹ *Id* 151

⁵⁰² *Id* 151

⁵⁰³ *Id* 151

⁵⁰⁴ *Id* 151

⁵⁰⁵ *Id* 151

⁵⁰⁶ *Id* 152

⁵⁰⁷ *Id* 152

⁵⁰⁸ *Id* 167

⁵⁰⁹ *Id* 167

⁵¹⁰ *Id* 165

court and “the significant managerial, advisory and administrative responsibilities exercised within the court.”⁵¹¹ Judiciary receives no ‘preference-related pay’ in determining their salaries.⁵¹²

On the other hand, this determination is not unsupervised. It shall be under the guidance of the Senior Salaries Review Body (SSRB).⁵¹³ The nature of the SSRB is not binding to the government.⁵¹⁴ In 2009, the government did not apply the suggested raises in full.⁵¹⁵ SSRB examines whether current salaries suit the needs of the judiciary.⁵¹⁶ The structure of the judicial pay is reviewed every four to five years, to ensure that the pay is within the national economic growth and inflations.⁵¹⁷ Finally, judges (unlike Egypt), do not get any form or privilege or taxable benefit.⁵¹⁸

4) Resources: the principle of determining the budget of the judiciary is Her Majesty’s Court and Tribunal Service (HMCTS). The Minister of Justice is the one in charge of negotiating the budget with the HMCTS.⁵¹⁹ The budget, then, becomes part of the Ministry of Justice’s budget, which would be subject later to reduction.⁵²⁰ Hence, there is clear tension between the government and the judiciary in regards to budgetary issues.

4. Separation of powers in the United Kingdom

The Constitutional Reform Act CRA played a vital role in increasing areas of separation of power through three issues. Firstly, it prevents the Lord Chief Justice from joining the cabinet, or speaking in the House of Lords.⁵²¹ Secondly, it creates a new mechanism of judicial appointment away from the executive authority.⁵²² Thirdly, neither members of the judiciary can be nominated in the Parliament, nor the members of the Parliament can be nominated in the judiciary.⁵²³

As for legislative body, members of the parliament cannot disapprove of any judiciary judgments.⁵²⁴ However, decisions and conduct of judges can be raised for debate before either House.⁵²⁵ Based on the UK judicial literature, the relationship with the executive authority is not yet well developed. Until present, the executive authority criticizes the judiciary, especially when it comes to reviewing cases related to the government breach of human rights.⁵²⁶

There are two main types of improper influence over the judiciary. The first type is related to officials applying pressure, assignment of certain judges to certain cases, or even taking bribes.⁵²⁷ For this type there is no clear evidence that it exists in the current judiciary in the United Kingdom.⁵²⁸ The second

⁵¹¹ *Id* 165

⁵¹² *Id* 165

⁵¹³ *Id* 165

⁵¹⁴ *Id* 165

⁵¹⁵ *Id* 166

⁵¹⁶ *Id* 165

⁵¹⁷ *Id* 165

⁵¹⁸ *Id* 166

⁵¹⁹ *Id* 173

⁵²⁰ *Id* 173

⁵²¹ *Id* 174

⁵²² *Id* 174

⁵²³ *Id* 174

⁵²⁴ *Id* 174

⁵²⁵ *Id* 175

⁵²⁶ *Id* 175

⁵²⁷ *Id* 177

⁵²⁸ *Id* 175

type is done by the public expressing their concerns in the media.⁵²⁹ This type is not limited to what public concern is, but it sometimes extends to members of the Parliament echoing public concern.⁵³⁰

C. Judicial Independence in France:

Judicial independence is part and parcel of the French judiciary. It was, among many other factors, the reason to adopt the French legal system.⁵³¹ The French constitution, as shown previously, explicitly granted independence to the judicial authority. It gives the president of the Republic the responsibility to be the guarantor of such independence.⁵³² Independence is reflected in the legislation and the practice of the French judiciary within its two branches.

The French legal system is widely known to have a clear distinction between the administrative courts represented in the *Conseil d'Etat*, and Administrative Courts and the *Justice Judiciaire* or the Ordinarily Courts.⁵³³ As such, this section is divided into three main sub-sections. The first two deal with the different rules of the types of the judiciary in France, the third deals with the issue of the Separation of Power. It is also important to note that the both judges and the prosecutor follow the same rules of promotion, appointment, and salaries.

1. Judicial independence: Independence on the Bench

Unlike the system in the US, working as a judge or a prosecutor is a career that a prosecutor or a judge decides upon as they obtain their law degrees. The length of serving in office for judges is 40 years, until their retirement.⁵³⁴ Once the judge or the prosecutor is nominated, he cannot be removed from office except by impeachment.¹ The constitution determines the formulation and the process of impeachment of both prosecutors and judges,⁵³⁵ to be discussed in detail in the accountability chapter.

Based on the fact that their nomination is for life, judges get promoted to work in the higher court based on several prerequisites.⁵³⁶ These prerequisites vary based on the rank of the judges, either the first rank, second rank, or unranked offices.⁵³⁷ As for the promotion of ranked judges (both first and second ranks), they have to meet two requirements. The first is the seniority requirement (a certain length of service), the second is scoring a certain level in the performance evaluation report, administered yearly by the supervisor judge.⁵³⁸

The promotion of unranked judges is easier than that of ranked judges. A judge, who wishes to join as an unranked officer, shall serve for “two first-tier offices in two different jurisdictions.”⁵³⁹ These judges neither have to go through the promotional committee, nor an annual performance report.⁵⁴⁰

Magistrates do not have any legal benefit or immunity from acts committed outside their work.⁵⁴¹ However, as I will show later, magistrates have immunity. They are granted many procedural rights that lead to factual immunity. In this regard, there are many aspects existent in the French judiciary.

⁵²⁹ *Id* 175

⁵³⁰ *Id* 175

⁵³¹ MARY L. VOLCANSEK, ELISABETTA DE FRANCISCIS, AND JACQUELINE LUCIENNE LAFON, JUDICIAL MISCONDUCT A CROSS-NATIONAL COMPARISON, 20 (1996) (Springer 2012)

⁵³² FRANCE CONST. § 64.

⁵³³ Antoine Garapon and Harold Epineuse, *Judicial Independence in France*, ANJA SEIBERT-FOHR (ED), JUDICIAL INDEPENDENCE IN TRANSITION, 274 (Springer 2012)

⁵³⁴ *Id* at 284

⁵³⁵ *Id* at 284

⁵³⁶ *Id* at 285

⁵³⁷ *Id* at 285

⁵³⁸ *Id* at 285

⁵³⁹ *Id* at 285

⁵⁴⁰ *Id* at 285

⁵⁴¹ *Id* at 293

Besides, judges are not held liable for any misinterpretation or application of the law. The French legal system depends on the review of higher courts. Any judgment is not enforceable unless it has passed two stages of adjudication. For example, in any civil case, if the judge issues a certain decision, this decision is not executable, unless the appeal process is exhausted. This system is called *double degree de jurisdiction*.⁵⁴²

2. Judicial Independence: Institutional Independence

The executive module of administrating the judiciary in France is the dominant system. The head of the executive authority (president) is the grantor of judicial independence.⁵⁴³ The executive administration to the judiciary lays under the supervision of the Parliament, which is “the ultimate sear of sovereignty.”⁵⁴⁴ The Minister of Justice, a member of the executive authority, is the person in charge of administering “public service of justice.”⁵⁴⁵ On the other hand, the Minister of Justice does not take any judicial responsibilities.⁵⁴⁶ His responsibilities are limited to determining national policies related to the judiciary.⁵⁴⁷

The *Conseil Supérieur de la Magistrature* (the High Judicial Council) is another important entity in the administration of the judiciary in France. The role of the Judicial Council is to aid the president of the Republic in ensuring its independence.⁵⁴⁸ The Council consists of two sections, “one with jurisdiction over judges, and the other over public prosecutors.”⁵⁴⁹ The origination has passed through two main stages: the first, mentioned in the old version of 1958 Constitution indicates the judicial nature of the council. The second, which is the text of the formulation, is mentioned in the 1958 Constitution.⁵⁵⁰ The organization of the section has been changed in 2008.⁵⁵¹ The new amendment added public figures and citizens to the formulation of the judicial council. Since 2011, the present formulation comes into effect.⁵⁵² The total number of the Council members is twelve: eight prosecutors and judges, who are elected and represent the different court levels, and four non-judicial members appointed from the president of the republic.

As for case assignment, there are two ways of assigning cases in France. Firstly, cases are assigned based on the case type and form.⁵⁵³ The French system is based on material jurisdiction: such as territorial jurisdiction or personal jurisdiction.⁵⁵⁴ Secondly, the head of the court administers assigning cases to magistrates. This assignment is based on the skills and availability of judges.⁵⁵⁵

⁵⁴² *Id* at 293

⁵⁴³ *Supra note* 533 at 276

⁵⁴⁴ *Id* at 276

⁵⁴⁵ *Id* at 276

⁵⁴⁶ *Id* at 276

⁵⁴⁷ *Id* at 276

⁵⁴⁸ FRANCE CONST. § 64 and 65.

⁵⁴⁹ FRANCE CONST. § 65 /1

⁵⁵⁰ FRANCE CONST. § 65 states that the “section with jurisdiction over judges shall comprise, in addition to the President of the Republic and the Minister of Justice, of five judges, one public prosecutor, Conseiller d’Etat appointed by the Conseil d’Etat, and three prominent citizens, who are neither members of the Parliament, nor the Judiciary. They shall be appointed respectively by the President of the Republic, the President of the National Assembly, and the President of the Senate. The Section with jurisdiction over the public prosecutor shall comprise, in addition to the President, of the Republic and the Minister of Justice, five public prosecutors, one judge, and the Conseiller d’Etat, together with the three prominent citizens.”

⁵⁵¹ FRANCE CONST. § 65

⁵⁵² *Supra note* 533 at 273

⁵⁵³ *Id* at 288

⁵⁵⁴ *Id* at 287

⁵⁵⁵ *Id* at 288

Cases are reassigned in the French system, based on various factors. For instance, judges should look into any conflict of interest between the judges.⁵⁵⁶ Secondly, parties have the right to request a change of judges assigned in certain cases. They have to prove a form of bias or previous relationship between the judge and any of the individuals involved.⁵⁵⁷

As for remuneration, the MoJ is concerned with salaries and compensation for judges.⁵⁵⁸ The payment of judges depends on one factor: their rank. Judges of the same rank, seniority and duties performed are paid equally.⁵⁵⁹ Besides, judges receive an additional benefit called the *prime modulable*.⁵⁶⁰ This benefit or bonus was initially given at the beginning to judges of the *cour de cassation*. However, in 2003, the benefit was extended to the all the members of the judiciary in France.⁵⁶¹ The amount of this bonus ranges between 41% of their salaries to reach 47% depend of the future pay to each judge.⁵⁶² Additionally, judges who do more judicial work would be compensated more based on their extra tasks. For example, judges who replaced his/her colleagues and perform their work would be eligible for extra compensation. The principle of continuity of the judiciary is the dominant principle in the civil law judiciary.⁵⁶³

3. The Issue of Separation of Power in France

The separation of power is a debatable issue in France, since both the president and the parliament are elected authorities. On the other hand, the judiciary is not elected and hence it is not an authority. Rather, it is considered to be a power.⁵⁶⁴ Besides, courts are prohibited to adjudicate over any legislation, bill, or any document from the legislative body.⁵⁶⁵ Courts are only allowed to resolve the disputes raised from the application of legislations.⁵⁶⁶

Presently, the judiciary in France is working towards balance between the three divisions of the government. The reason is twofold. Firstly, Courts are entitled to check legislation to determine whether they comply with international and European laws.⁵⁶⁷ Secondly, constitutional reform in France in 2008 went further so that Constitutional Council can review cases. Instead of the only reviewing legislation before the proclamation of legislation, the reform expanded the authority of the inferior courts “to send a pending case for constitutional review to the *Conseil Constitutionnel*.”⁵⁶⁸

The legislative authority can interfere in the adjudication of the cases in four cases.⁵⁶⁹ These cases are interpretative laws, retroactive laws, validating laws, and the law of amnesty. Other than these cases, the legislative body would not intervene in the work of the judiciary in France.⁵⁷⁰ As for the interpretative laws, the legislative authority promulgates a legislation that imposes a certain statutory interpretation over the courts.⁵⁷¹ These statutes are retroactive in nature, but since it is an interpretation of an old legislation, it is not pure retroactive law. The *cour de cassation* has criticized the

⁵⁵⁶ *Id* at 288

⁵⁵⁷ *Id* at 288

⁵⁵⁸ *Id* at 286

⁵⁵⁹ *Id* at 286

⁵⁶⁰ *Id* at 287

⁵⁶¹ *Id* at 287

⁵⁶² *Id* at 287

⁵⁶³ *Id* at 288

⁵⁶⁴ *Id* at 278

⁵⁶⁵ *Id* at 273

⁵⁶⁶ *Id* at 273

⁵⁶⁷ *Id* at 274

⁵⁶⁸ *Id* at 274

⁵⁶⁹ *Id* at 297

⁵⁷⁰ *Id* at 297

⁵⁷¹ *Id* at 297

interpretative laws.⁵⁷² It has considered that such legislation is interference from the legislative authority in the judicial administration.⁵⁷³

Retroactive law is the legislation that applies retroactively. Such types of laws are prohibited based on Article 2 of French Civil Code.⁵⁷⁴ As for the validating laws, these validate executive regulation and decision.⁵⁷⁵ This type of legislation is more related to the administrative regulations.⁵⁷⁶ These types of law are “authorized provided they serve a pressing general interest and are limited in scope.”⁵⁷⁷ Finally, laws of amnesty are a widely accepted type of law, even though they are considered to violate judicial independence.⁵⁷⁸ These laws intend to put an end to any investigation to certain crimes.

As for the executive interference, the constitution states, the president of the Republic is the protector of the judicial independence in France.⁵⁷⁹ However, this is not the only guarantee to the judiciary against the executive authorities. Article 61 of the constitution mandates that the Constitutional Council reviews each law before its promulgation. It states that “Acts of Parliament may be referred to the Constitutional Council, before their promulgation by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, as well as sixty Members of the National Assembly or sixty Senators. In the cases provided for in the two foregoing paragraphs, the Constitutional Council must deliver its ruling within one month. At the request of the government in cases of urgency, this period shall be reduced to eight days.”⁵⁸⁰

D. Judicial Independence in Germany

After the Second World War, Germany was divided into four major parts. Each division was under the authority of one of the allies, which are France, United States, United Kingdom, and Russia.⁵⁸¹ This division has affected the present status of Germany today. As Germans tried to unify, they adopted the federal system of government as a tool for their unification. Thus, there are two levels of government, one is federal and the other is state level. The scope of this research is limited to the federal level of the judiciary in Germany. The German judicial system is regulated in the German Constitution. Article 92 of the constitution organizes the judiciary.⁵⁸²

While there are no clear rules or minimal rules in the common law jurisdictions about the regulation of the judiciary, the German Constitution is one of the most comprehensive in detailing the rules of independence, accountability, and judicial review. This detailed constitution gives the constitutional court in Germany less role than the US Supreme court in “shaping and controlling the federal system.”⁵⁸³

1. The present State of the Judicial Independence in Germany

⁵⁷² *Id* at 297

⁵⁷³ *Cour d' Cassation*, 1^{ere} civ, 9 July 2003, it states that L'on peut toutefois s'interroger sur la pertinence au cas d'espèce d'une telle motivation, puisqu'ainsi qu'il a déjà été évoqué, la loi de 2003 ne prévoyant nullement un effet rétroactif des dispositions adoptées, n'empêche pas ingérence du pouvoir législatif sur l'administration de la justice

⁵⁷⁴ Civil Code §2 states “legislation provides only for the future; it has no retrospective operation.”

⁵⁷⁵ *Supra note 533* at 297

⁵⁷⁶ *Id* at 297

⁵⁷⁷ *Id* at 297

⁵⁷⁸ *Id* at 297

⁵⁷⁹ FRANCE CONST. § 64.

⁵⁸⁰ FRANCE CONST. § 61.

⁵⁸¹ ERIC SOLSTEN, ED. GERMANY: A COUNTRY STUDY 362 (1995)

⁵⁸² GERMANY CONST. § 92, it states that the judicial power shall be vested in the judges; it shall be exercised by the Federal Constitutional Court, by the federal courts provided for in this Basic Law, and by the courts of the Länder

⁵⁸³ ARTHUR B. GUNLICKS, THE LANDER AND GERMAN FEDERALISM 72 (2003)

The judicial independence is, as mentioned before, the safeguard to the community, not only against the legislative and executive branches, but also against all government bodies.⁵⁸⁴ As mentioned in Article 97 of the constitution, judges are only loyal to the rule of law.⁵⁸⁵ Besides, the same article explicitly ensured the judicial independence of the judges. It states that “[j]udges shall be independent and subject only to the law.”⁵⁸⁶

The main principle in Germany is *Rechtsstaat*, which is basing the government on law.⁵⁸⁷ This principle is based on the fact that “citizens are guaranteed equality and in which government decisions can be amended.”⁵⁸⁸ The *land law* regulates the courts and their administration, under the federal system of judiciary.⁵⁸⁹ The Länder is the one in charge for the lower courts. As for the higher courts, they function on the federal level only.⁵⁹⁰

The Länder plays a vital role in ensuring independence of the judiciary.⁵⁹¹ It protects the judiciary against any potential interference. Article 30 of the Basic Law of the Federal Republic of Germany states that “[e]xcept as otherwise provided or permitted by this Basic Law, the exercise of state powers and the discharge of state functions is a matter for the Länder.”⁵⁹²

Unlike the French constitution, the *land* constitution did not organize court formulation whether ordinary or administrative.⁵⁹³ It was left for the ordinary legislation to standardize the types, specialization or even the regulation of the lower courts,⁵⁹⁴ except the *land* constitutional court. Article 94 regulates the “composition of the Federal Constitutional Court,”⁵⁹⁵ which will be discussed in details in the section entitled “Institutional Independence.”

The judicial independence in Germany has three dimensions. Firstly, judges are obliged to respect only the law when they rule in any case.⁵⁹⁶ They shall not decide based on personal knowledge, only on the merits of the case. Secondly, judges are protected against the “arbitrary external intervention.”⁵⁹⁷ This is based on Article 97 of the basic law of Germany, which will be discussed in detail in a later unit. Thirdly, the separation of power is represented in prohibition of sharing the judges in any executive or legislative authorities.⁵⁹⁸

2. Judicial Independence: Independence of the Bench

Tenure: Same as in France, judges are appointed Germany has a mandatory retirement age for its judges. They shall not be removed from office during their period of service.⁵⁹⁹ The retirement age varies between the state and the federal levels. While being 65 on the state level, it is 67 on the federal

⁵⁸⁴ Anja Seibert-Fohr, Judicial Independence in Germany, ANJA SEIBERT-FOHR (ED), JUDICIAL INDEPENDENCE IN TRANSITION, 449 (Springer 2012)

⁵⁸⁵ *Id* at 449

⁵⁸⁶ GERMANY CONST. § 97

⁵⁸⁷ *Supra* note 581 at 362

⁵⁸⁸ *Id* at 362

⁵⁸⁹ *Id* at 362

⁵⁹⁰ *Id* at 362

⁵⁹¹ *Id* at 363

⁵⁹² GERMANY CONST. § 30

⁵⁹³ *Supra* note 583 at 152

⁵⁹⁴ GERMANY CONST. § 30

⁵⁹⁵ GERMANY CONST. § 94

⁵⁹⁶ Anja Seibert-Fohr, Judicial Independence in Germany, ANJA SEIBERT-FOHR (ED), JUDICIAL INDEPENDENCE IN TRANSITION, 449 (Springer 2012)

⁵⁹⁷ *Id* at 449

⁵⁹⁸ *Id* at 450

⁵⁹⁹ *Id* at 471

level.⁶⁰⁰ As for the judges of the constitutional court, they have a special status in the constitution. Article 97/2 states the general rules for the judges of the Constitutional Court related to tenure, age and removal from office.⁶⁰¹

As for promotion, judges of the higher courts are appointed from the lower courts after meeting certain conditions of seniority and performance in the lower courts.⁶⁰² This rule applies to any promotion, either to promote to the president of court, or a panel of judges.⁶⁰³ The Minister of Justice plays a major role in this process, in which he shares responsibility with the advisory judicial council and consultation of the competent Presidential council.⁶⁰⁴

The role of the Minister of Justice is a considered a serious concern in the German judiciary that jeopardizes judicial independence. The Minister of Justice enjoys major discretion in judicial promotion. Judges could be penalized for their “unpalatable judgments,” or even having the intention of passing a certain judgment to please the administration.⁶⁰⁵ For the present circumstances, this would be more relevant to the administrative courts, which deals with cases directly related to the government.⁶⁰⁶ There is currently a debate to change the role of the Minister of Justice and assign this function to an independent judicial body.⁶⁰⁷

Immunity: Section 839 of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*) regulates the issue of judges’ liability. It maintains that judges would only be liable for acts that come from his/her acts due to breaching the criminal code. It states that “if an official breaches his official duties in a judgment, then he/she is only responsible for any damage arising, if the breach of duty entails a criminal offence, this provision is not applicable to refusal to apply breach of duty in exercising a public function.”⁶⁰⁸

i. Judicial Independence: Institutional Independence

The principle of justice administration is that it is done in the name of the people.⁶⁰⁹ The German judiciary has two dimensions. The first is related to the structure, while the second to the level of administration structure. Both the federal government and the Länder, as a dual structure of the German’s federation, are responsible for regulating the German Judiciary.⁶¹⁰ As for the level of the administration, the Minister of Justice plays a role in the administration for both state courts and federal courts.⁶¹¹

⁶⁰⁰ *Id* at 471

⁶⁰¹ GERMANY CONST. § 97, states that judges appointed permanently to full-time positions may be involuntarily dismissed, permanently or temporarily suspended, transferred or retired before the expiration of their term of office only by virtue of judicial decision and only for the reasons and in the manner specified by the laws. The legislature may set age limits for the retirement of judges appointed for life. In the event of changes in the structure of courts or in their districts, judges may be transferred to another court or removed from office, provided they retain their full salary.

⁶⁰² Anja Seibert-Fohr, Judicial Independence in Germany, ANJA SEIBERT-FOHR (ED), JUDICIAL INDEPENDENCE IN TRANSITION, 473 (Springer 2012)

⁶⁰³ *Id* at 473

⁶⁰⁴ *Id* at 474

⁶⁰⁵ *Id* at 476

⁶⁰⁶ *Id* at 476

⁶⁰⁷ *Id* at 474

⁶⁰⁸ GERMANY CIVIL CODE § 839

⁶⁰⁹ Hans-Ernst Bottcher, *The Role of the Judiciary in Germany*, 5 German L.J. 1317 (2004), 1323

⁶¹⁰ Anja Seibert-Fohr, Judicial Independence in Germany, ANJA SEIBERT-FOHR (ED), JUDICIAL INDEPENDENCE IN TRANSITION, 452 (Springer 2012)

⁶¹¹ *Id* at 453

The principle in the administration of the German judiciary is not absolute independence.⁶¹² However, the administration of the judiciary is based on the principle of democratic governance that depends on “mutual check and balance.”⁶¹³ The federation balances between judicial accountability, and judicial role in reviewing the cases and political questions.⁶¹⁴ There is a clear distinction between issues related to judicial administration and issues related to the status of judges.⁶¹⁵ As for the administration of the courts, it is the responsibility of the Ministry of Justice and the senior judges in each court.⁶¹⁶ As for the judges, they are competent only with settlement disputes, their promotion, transfer and judicial disciplinary.⁶¹⁷ There are special clauses related to the composition of the Federal Constitutional Court in Article 92 of the Constitution.⁶¹⁸

The supreme federal court in Germany, unlike that of the US, is not one federal circuit specialized in every type of law. There are several courts, where each is specialized in a certain type of law. Article 95/1 of the Supreme federal courts states “The Federation shall establish the Federal Court of Justice, the Federal Administrative Court, the Federal Finance Court, the Federal Labor Court and the Federal Social Court as supreme courts of ordinary, administrative, financial, labor and social jurisdiction.”⁶¹⁹ Besides, Article 96 regulates some other types of the federal court.⁶²⁰

As for judicial councils, there are no unified judicial councils like those in France. This situation results from the nature of the German federation.⁶²¹ However, each state has two types of Councils to regulate important issues related to the judiciary. These two types are the judicial council and presidential council. The Federal Judges Act requires that each state would have its own judicial council, called the *Richterrate*.⁶²² This council addresses the social and general issues that concern judges of certain states.⁶²³ Each council is made up of seven members, who are all elected by their colleagues in state courts.⁶²⁴ As for presidential Councils, which are called *Prasidialrate*, it has advisory function to matters related to the status of the judges on the state level.⁶²⁵ The presidential council also exists on

⁶¹² *Id* at 450

⁶¹³ *Id* at 369

⁶¹⁴ *Id* at 369

⁶¹⁵ *Id* at 453

⁶¹⁶ *Id* at 453

⁶¹⁷ *Id* at 453

⁶¹⁸ GERMANY CONST. § 92, it states that (1) The Federal Constitutional Court shall consist of federal judges and other members. Half the members of the Federal Constitutional Court shall be elected by the Bundestag and half by the Bundesrat. They may not be members of the Bundestag, of the Bundesrat, of the Federal Government, or of any of the corresponding bodies of a Land. (2) The organization and procedure of the Federal Constitutional Court shall be regulated by a federal law, which shall specify in which instances its decisions shall have the force of law. The law may require that all other legal remedies be exhausted before a constitutional complaint may be filed, and may provide for a separate proceeding to determine whether the complaint will be accepted for decision.

⁶¹⁹ GERMANY CONST. § 92

⁶²⁰ GERMANY CONST. § 49, it states that (1) The Federation may establish a federal court for matters concerning industrial property rights. (2) The Federation may establish federal military criminal courts for the Armed Forces. These courts may exercise criminal jurisdiction only during a state of defense or over members of the Armed Forces serving abroad or on board warships. Details shall be regulated by a federal law. These courts shall be under the aegis of the Federal Minister of Justice. Their full-time judges shall be persons qualified to hold judicial office. (3) The Supreme Court of review from the courts designated in paragraphs (1) and (2) of this Article shall be the Federal Court of Justice (4) The Federation may establish federal courts for disciplinary proceedings against, and for proceedings on complaints by, persons in the federal public service

⁶²¹ Anja Seibert-Fohr, *Judicial Independence in Germany*, ANJA SEIBERT-FOHR (ED), *JUDICIAL INDEPENDENCE IN TRANSITION*, 459 (Springer 2012)

⁶²² *Id* at 459

⁶²³ *Id* at 459

⁶²⁴ *Id* at 460

⁶²⁵ *Id* at 460

the Federal level.⁶²⁶ Additionally, there are very comprehensive rules to the representation of judges. It is mentioned in the second chapter in sections between 49 and 60. Section 49 tackles the issue of the council of judges and council for judicial appointments.

Judges enjoy a great protection in the constitution against transfer. Article 97/1 states “[J]udges appointed permanently to full-time positions may be involuntarily dismissed, permanently or temporarily suspended, transferred or retired before the expiration of their term of office only by virtue of judicial decision and only for the reasons and in the manner specified by the laws.”⁶²⁷ The only exception is the case of changing the structure of the court or the district. In this case, “judges may be transferred to another court or removed from office, provided they retain their full salary.”⁶²⁸

The issue of case assignment is really important to judicial independence in the German judiciary. Each court has a Judicial Board called *Prasidium*, and the court president is a member.⁶²⁹ The board is responsible for determining the criteria of case assignment in each court.⁶³⁰ These methods vary according to the time of filing the case, name of the accused, and even the district where the crime was committed. The general rule when choosing the method is being comprehensive and unambiguous.⁶³¹ If the previous rule is violated, the law protects the right to challenge it. Parties to such dispute can raise bring an appeal, unless the decision to change the previous rule is taken on solid grounds. It is also the prohibition to establish extraordinary courts.⁶³² The only exception is “courts for particular fields of law.”⁶³³ The legislative authority may establish such specialized courts.⁶³⁴

Law sets the rules for salary of the judges.⁶³⁵ The legislature enjoys a great deal of discretion to determine remuneration of the judges. This is considered as part of the checks and balances between the judiciary and the legislative authority, to be discussed in the issue of separation of power in a later element in this chapter. The constitutional court has set several rules to the remuneration of the judiciary in Germany.⁶³⁶ The different laws depend on whether the judge is on the state level or on the federal level. Remuneration is also based on the number of years in service.⁶³⁷ Besides, there is still a current debate on the age of the judge, and the years in service that shall be the measurement in determining the salary for each judge. This debate is raised to eliminate discrimination in age among judges.⁶³⁸

Judges are servants of the federation and *land*.⁶³⁹ In doing such function, they only obey the law. The Federal Judiciary Act prohibits members of the judiciary from joining either the executive or the legislative bodies. Vis-à-vis, the members of either the executive or the parliamentary cannot be a members the judiciary. Besides, any judge, who is a member of the *Bundestag* or the Federal parliament, who refuses to resign from the legislative body, shall be dismissed from service. Section 21/2 of the Federal Judiciary Act states that a “Judge shall be dismissed ... where at the time of his

⁶²⁶ *Id* at 460

⁶²⁷ GERMANY CONST. § 97

⁶²⁸ GERMANY CONST. § 97

⁶²⁹ Anja Seibert-Fohr, *Supra* Note 584 AT482 (Springer 2012)

⁶³⁰ *Id* at 482

⁶³¹ *Id* at 482

⁶³² GERMANY CONST. § 101 states “[e]xtraordinary courts shall not be allowed. No one may be removed from the jurisdiction of his lawful judge.”

⁶³³ GERMANY CONST. § 101

⁶³⁴ GERMANY CONST. § 101

⁶³⁵ Anja Seibert-Fohr, *JSupra* Note 584 AT 488 (Springer 2012)

⁶³⁶ *Id* at 478

⁶³⁷ *Id* at 478

⁶³⁸ *Id* at 479

⁶³⁹ GERMANY FEDERAL JUDICIARY Act § 3

appointment he was a member of the Federal Parliament (Bundestag) or of a Land Parliament and did not resign his parliamentary seat within the reasonable time-limit set by the highest service authorities concerned.”⁶⁴⁰

As for the legislative interference, judicial review is an important issue in the German judicial function. It is the guardian of “fundamental rights even against democratic decision of parliament levels of jurisdictions.”⁶⁴¹ Judicial independence is a constitutional right; it is directed against both legislative and the executive bodies of the government.⁶⁴² On the other hand, there is unlimited influence of the judiciary over other authorities. Both the *Bundestag* and *Bundesrat* are the competent bodies to elect members of the Constitutional Court. Besides, members of the Constitutional Court cannot be members of either legislative or executive authorities. Article 97 states that “half the members of the Federal Constitutional Court shall be elected by the Bundestag and half by the Bundesrat. They may not be members of the Bundestag, of the Bundesrat, of the Federal Government, or of any of the corresponding bodies of a Land.”⁶⁴³ As for the executive interference, unlike France, the president of the federation is not the protector of the independence of the judiciary in Germany. The judiciary is given authority over that position federal president. This authority is represented in the impeachment of the federal president.⁶⁴⁴

E. Judicial Independence in Russian Federation

1. The Status of the Judicial Independence in the Russian Federation

After the Russian Revolution in 1917, Communism led the country.⁶⁴⁵ The existing constitution at the time was the Russian Socialist Federative Soviet Republic Constitution of 1918.⁶⁴⁶ This scholarship founded the dictatorship in the country.⁶⁴⁷ This constitution abolished any form of courts or bar. The whole system was subject to the directions of the Communist Party.

In 1924, a new constitution was adopted, during the leadership of Vladimir Lenin.⁶⁴⁸ It established a new constitutional court, which was given authority to nullify the administrative decrees. However, this authority was always subject to the acceptance of the “Central Executive Committee and its presidium.”⁶⁴⁹ The court was not independent by any means.⁶⁵⁰ It did not have any authority either over the Soviet Congress or Central Executive Committee.⁶⁵¹

⁶⁴⁰ GERMANY FEDERAL JUDICIARY Act § 21/2-2

⁶⁴¹ Anja Seibert-Fohr, *Supra* Note 584 AT 447 (Springer 2012)

⁶⁴² *Id* at 449

⁶⁴³ GERMANY CONST. § 97

⁶⁴⁴ GERMANY CONST. § 61, it states that Article 61 [Impeachment before the Federal Constitutional Court]: The Bundestag or the Bundesrat may impeach the Federal President before the Federal Constitutional Court for willful violation of this Basic Law or of any other federal law. The motion of impeachment must be supported by at least one quarter of the Members of the Bundestag or one quarter of the votes of the Bundesrat. The decision to impeach shall require a majority of two thirds of the Members of the Bundestag or of two thirds of the votes of the Bundesrat. The case for impeachment shall be presented before the Federal Constitutional Court by a person commissioned by the impeaching body. (2) If the Federal Constitutional Court finds the Federal President guilty of a willful violation of this Basic Law or of any other federal law, it may declare that he has forfeited his office. After the Federal President has been impeached, the Court may issue an interim order preventing him from exercising his functions.

⁶⁴⁵ HERMAN SCHWARTZ, *THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST- COMMUNIST EUROPE*, 109, (2000)

⁶⁴⁶ *Id* at 111

⁶⁴⁷ *Id* at 111

⁶⁴⁸ *Id* at 112

⁶⁴⁹ *Id* at 112

⁶⁵⁰ *Id* at 112

⁶⁵¹ *Id* at 112

This philosophy took place during the ruling of Joseph Stalin, George Malenkov, until the rule Boris Yeltsin in 1991. After the collapse of the Soviet Union, President Boris Yeltsin led the current reform in the country, and especially judicial reform in 1992.⁶⁵² During the communist ruling, the judiciary was under, like any other authority in the country, Supreme Soviet Council.

Many judicial reforms took place in the Russian Federation in the past two decades. Such reform was intended to increase both judicial independence and judicial accountability.⁶⁵³ The judicial system in the Russian Federation is organized through several frameworks. They consist of the Russian Federation Constitution (1993), Federal Constitutional Law on Judicial System (1996, amended 2005), Federal Law on the status of Judges (1992, amended 2005), Federal law on the Bodies of the Judicial Corps (2002, amended 2009), and Federal Constitutional law on the justice system (1996).

The judiciary in the Russian Federation is divided into three main branches. The first is ordinary courts, which has general jurisdiction over the different disputes of criminal, civil, family and administrative laws.⁶⁵⁴ This type has the Supreme Court as the higher level of adjudication. The second type is the *Arbitrazh* Courts. It is specialized in commercial disputes that involve either financial or commercial organizations.⁶⁵⁵ The High *Arbitrazh* Court is the highest court for this division of justice in the Russian Federation.⁶⁵⁶ Finally, the Constitutional Court is an independent body. It does not have any authority over courts beneath it.⁶⁵⁷ Judicial independence applies to all these types of courts. The Constitution of the Russian Federation has established three independent authorities.⁶⁵⁸

2. Judicial Independence: Independence on Bench in Russian Federation

In the constitution, Article 120/1 states that “judges shall be independent and shall obey only the constitution of the Russian Federation and the federal law.”⁶⁵⁹ **Tenure:** Article 121 of the constitution establishes the judicial tenure. It states that “judges may not be replaced.”⁶⁶⁰ The methods of removing a judge from office are left to the federal law. Article 121/2 states that a “judge may not have his powers terminated or suspended except under procedures and on grounds established by federal law.”⁶⁶¹ The law of the Status of Judges regulates terms of office for a judge. Article 11 paragraph 1 states that “the power of a judge of a federal court are not limited by a certain term. The age limit for judges is 70 years, unless otherwise stipulated in a corresponding federal constitutional law.”⁶⁶² This article sets the rule for the federal courts indicating that judges cannot be removed from office, except by reaching the age of 70.

There is clear evidence of the influence of the court chairperson over the probationary judges, who seek to get formal appointment.⁶⁶³ The base of this threat is based on the authority of the chairperson to

⁶⁵² *Id* at 109

⁶⁵³ Peter H. Solomon, *The New Justices of the Peace in the Russian Federation: A Cornerstone of Judicial Reform?*, 381, https://www.gwu.edu/~ieresgwu/assets/docs/demokratizatsiya%20archive/11-3_Solomon.PDF

⁶⁵⁴ Russia Rule of Law assessment, USAID Report 13 (2008) http://pdf.usaid.gov/pdf_docs/Pnadt920.pdf

⁶⁵⁵ *Id* at 13

⁶⁵⁶ *Id* at 13

⁶⁵⁷ *Id* at 13

⁶⁵⁸ RUSSIAN FEDERATION CONST. § 10 provides that “state power in the Russian Federation shall be exercised on the basis of its division within the legislative, executive and judicial authorities. Bodies of legislative, executive and judicial authority shall be independent.”

⁶⁵⁹ RUSSIAN FEDERATION CONST. § 120/1

⁶⁶⁰ RUSSIAN FEDERATION CONST. § 121/1

⁶⁶¹ RUSSIAN FEDERATION CONST. § 121/2

⁶⁶² LAW ON THE STATUS OF JUDGES § 11/1

⁶⁶³ Olga Schwartz and Elga Sykiainen, *Judicial independence in the Russian Federation*, ANJA SEIBERT-FOHR (ED), JUDICIAL INDEPENDENCE IN TRANSITION, 1004 (Springer 2012)

recommend the appointment of a certain probationary judge.⁶⁶⁴ Besides, there was no age limit of retirement before the 2001 judicial reform. In 2001, an age limit was set to all judges to be 65.⁶⁶⁵ After a short period, the age was changed to reach 70, based on a presidential recommendation.⁶⁶⁶

Additionally, judges cannot be removed from office. Article 12 of Status of Judges Law insures that “judge is irremovable. A judge cannot be transferred to another position or to another court without her/his consent. Judicial power may only be terminated or suspended on the grounds and in the manner, stipulated in this law.”⁶⁶⁷ On the other hand, the president of the Federation is responsible for nominating ordinary judges, chief judges and their deputies.⁶⁶⁸ The process of judges’ promotion lacks transparency.⁶⁶⁹ There are no clear rules related to the promotion of judges, as they do not need to take any further examination to promote from a certain level to the next level.⁶⁷⁰ They just have to “show obedience and loyalty to the court chairperson.”⁶⁷¹

Immunity: The judicial law does not regulate judicial immunity in the Russian Federation; rather it finds its basis in the constitution. Article 122 of the Constitution states “judges shall be immune.”⁶⁷² However, this does not mean that judges are above the law. The second paragraph sets the terms for prosecuting a judge, who commits a criminal offense. It states that “criminal proceedings may not be brought against a judge except as provided for by federal law.”⁶⁷³ Article 16 of the Law of the Status of Judges regulates, in detail, the immunity of judge.⁶⁷⁴ It has also regulated the cases where a judge commits criminal offense. Article 13/5 states “if judge was detained on suspicion of committing a crime or on another basis or was forcibly delivered to any state body, and the identity of the judge was not known at the moment of detention, the judge must be immediately released after her/his identity is established. Personal search is not allowed.”⁶⁷⁵

3. Judicial Independence: Institutional Independence

Judicial administration: The administration of the court used to be the responsibility of the Ministry of Justice until 1998.⁶⁷⁶ The administration was reformed afterwards to transfer all the responsibility of the Ministry of Justice to the Judicial Department under the Supreme Court.⁶⁷⁷ The current constitution and its amendment give an overview of the present administration to the justice system. Article 118 of the constitution regulates the administration of court and justice system in Russian Federation. In paragraph 1, it states “justice in the Russian Federation shall be administered only by law courts.”⁶⁷⁸

⁶⁶⁴ *Id* at 1004

⁶⁶⁵ *Id* at 1005

⁶⁶⁶ *Id* at 1005

⁶⁶⁷ LAW ON THE STATUS OF JUDGES § 12

⁶⁶⁸ Olga Schwartz and Elga Sykiainen, *Supra note* 663 at 1008

⁶⁶⁹ *Id* at 1007

⁶⁷⁰ *Id* at 1007

⁶⁷¹ *Id* at 1009

⁶⁷² RUSSIAN FEDERATION CONST. § 122/1

⁶⁷³ RUSSIAN FEDERATION CONST. § 122/2

⁶⁷⁴ LAW ON THE STATUS OF JUDGES § 13/1,2 it states that “judge is immune. This includes personal immunity, immunity of domestic and office premises, of personal and service transport vehicles used by the judge, the inviolability of the judge’s documents, luggage and other property, the privacy of letters and of other correspondence. A judge cannot be held in any way liable for the expression of opinion in the administration of justice or for decision adopted by a court, unless the judge is found guilty of abuse of power or knowing adoption of an unlawful sentence decisions or another judicial act, by virtue of an effective court sentence. “

⁶⁷⁵ LAW ON THE STATUS OF JUDGES § 13/5

⁶⁷⁶ Russia Rule of Law assessment, USAID Report 15 (2008) http://pdf.usaid.gov/pdf_docs/Pnadt920.pdf

⁶⁷⁷ *Id* at 15

⁶⁷⁸ RUSSIAN FEDERATION CONST. § 118/1

Besides, the constitution draws the specialization of the courts. It states that “Judiciary power shall be exercised to constitutional, civil, administrative and criminal process.”⁶⁷⁹

Besides, Article 71 of the constitution gives the Russian Federation the jurisdiction over establishing the judicial bodies.⁶⁸⁰ It further stipulates “the judicial system, public prosecution, criminal, criminal-procedural and criminal-executive legislation, amnesty and remission, civil, civil-procedural and arbitration-procedural legislation, legal regulation of intellectual property.”⁶⁸¹ Besides, the definition of the judicial bodies is not defined in the constitution.⁶⁸²

Case Assignment: Article 47 of the Constitution of the Russian Federation states that “[n]obody may be deprived of the right to have his (her) case heard in the court and by the judge within whose competence the case is placed by law.”⁶⁸³ However, there are no rules fair and abstract rules related to case assignment. The court chair enjoys great discretion in assigning cases to certain judges. There is a clear lack of legal rules regulating case assignment in the Russian Federation.⁶⁸⁴ The chairperson of the court would assign cases based on the ability of the judge on certain cases, or even based on the personal preference of the chairperson for a certain judge. There is also a clear lack of rules determining the judges “subject or territorial jurisdiction within the jurisdiction of the particular court.”⁶⁸⁵

There is a clear public perception of the intervention of the executive authority in the work of the judicial authority. This perception is based on two facts. Firstly, the President of the Federation plays a major role in choosing the chairpersons of local courts. Secondly, the authority of these chairpersons in assigning certain cases to certain judges is unlimited with certain legal rule.⁶⁸⁶ These two factors were enough to demolish any trust in the legal system of the Russian Federation.

Remuneration and Resources: Article 124 tackles the financing of courts in the Russian Federation. It states that “law courts shall be financed only out of the federal budget and financing shall ensure full and independent administration of justice in accordance with federal law.”⁶⁸⁷ Judges’ remuneration used to be very low during the Soviet Union.⁶⁸⁸ Salaries remained low, until the collapse of the Union. The salaries went up during 1990.⁶⁸⁹ Then judges’ salaries faced a crisis during the period of 1997-1998. There was major absence of funding for judges’ salaries. The crisis remained until 2002. The federal government increased the fund to be able to pay judges.⁶⁹⁰

The present Law of the Status of Judges regulates the material support of judges. Article 19 of the law states “the monthly monetary remuneration of a judge consists of a monthly salary in accordance with the occupied position of a judge, a monthly salary of a judge in accordance with the conferred qualification class, a monthly monetary reward, a monthly additional payment for the length of service, monthly additional payments for the scientific degree of a candidate of science in law ... a

⁶⁷⁹ RUSSIAN FEDERATION CONST. § 118/2

⁶⁸⁰ RUSSIAN FEDERATION CONST. § 71/d

⁶⁸¹ RUSSIAN FEDERATION CONST § 71/n

⁶⁸² Olga Schwartz and Elga Sykiainen, *Supra note* 663 at 1013

⁶⁸³ RUSSIAN FEDERATION CONST § 47/1

⁶⁸⁴ *Supra note* 663 at 1019

⁶⁸⁵ *Id* at 1019

⁶⁸⁶ *Id* at 1020

⁶⁸⁷ RUSSIAN FEDERATION CONST § 124

⁶⁸⁸ Olga Schwartz and Elga Sykiainen, *Judicial independence in the Russian Federation*, ANJA SEIBERT-FOHR (ED),

JUDICIAL INDEPENDENCE IN TRANSITION, at 1011

⁶⁸⁹ *Id* at 1012

⁶⁹⁰ *Id* at 1013

monthly additional payment for language skills and the use of foreign languages in the performance of duties.”⁶⁹¹

4. The Issue of Separation of Power in the Russian Federation

Until 1990, judges were members of the Communist party.⁶⁹² It is hard to talk either about the separation of power, or judicial independence during the Communist part. Such system was abolished in the current constitution. It recognizes the multiparty system. Article 13 of the constitution states “political diversity and multi-party system shall be recognized in the Russian Federation.”⁶⁹³ Hence, the principle of separation of power is not a genuine principle in the Russian Federation government, as the practice of such separation is relatively new, compared to such separation in the United States.

The first form of influence is from the executive authority. There is a clear interference of the executive authority in the work of the judiciary, either in their nomination, promotion, administration, case assignment, disciplinary actions or remuneration. The system still depends on the intelligence methods of the communist system in surveilling every person. For example, in the process of the promotion of judges in the Federation, there is an absence of clear rules for judges’ promotion. The chairperson of a certain Court would depend on “unofficial sources of information to make background checks on judges before deciding on their promotion. Among such unofficial sources could be informal chats with the judge’s colleagues or materials received from known police or security service officers.”⁶⁹⁴

Moreover, there is no formal form of complaint against judges or prosecutors in the Russian Federation. The only rules that exist are the ones related to the discipline and removal procedures.⁶⁹⁵ The chairpersons of every court collect information on judges in their courts from their colleagues, litigants or lawyers to use in evaluation of judges.⁶⁹⁶ It can also be used for promotion or transfer of judges to new position or new rank.⁶⁹⁷ Besides, the professional practice would lead judges to adopt certain decisions to maintain their jobs.⁶⁹⁸

Additionally, the government adopts the policy of “carrot and stick.” The salaries of the judicial authority are mainly in the hand of the government. This manifested in the financial crisis that the judiciary has faced during the period of 1998 through 2006. This crisis was unresolved until the central government offered to solve it.⁶⁹⁹ It is a clear sign from the government that even though the constitution grants certain rights, it is still the government that has the main influence.⁷⁰⁰

Secondly, the influence of the legislative over the judicial authority does not exist. This is not due to separation of power. Instead, in totalitarian regimes, it is hard to talk about legislative authority. It is only the executive authority that has an interest to interfere with the judicial work. The role of legislative authority is to maintain the separation of power and “checks and balance” between the three authorities.

IV. Proposed Reform to Judicial Independence in Egypt

⁶⁹¹ LAW ON THE STATUS OF JUDGES § 19

⁶⁹² Leon Aron, *Russia Reinvent the Rule of Law*, (2002)

(<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/aronRussiaJudicialReform.pdf>)

⁶⁹³ RUSSIAN FEDERATION CONST. § 13/3

⁶⁹⁴ Olga Schwartz and Elga Sykiainen, *Judicial independence in the Russian Federation*, ANJA SEIBERT-FOHR (ED), JUDICIAL INDEPENDENCE IN TRANSITION, at 1009

⁶⁹⁵ *Id* at 1021

⁶⁹⁶ *Id* at 1022

⁶⁹⁷ *Id* at 1022

⁶⁹⁸ *Id* at 1009

⁶⁹⁹ *Id* at 1013

⁷⁰⁰ *Id* at 1013

A. Assessment of the Judicial Independence in the Current Constitution

The current constitution arguably grants the judiciary unprecedented steps toward its full independence. These steps are considered as step backwards over checks and balance and transparency principles. Firstly, the constitution gives the judiciary the full authority over its budget. This reform was one of the major requests to all judges, lawyers and activists.⁷⁰¹ However, the article did give the public the right to supervise such budget.⁷⁰² The problem lies in the fact that - in the republic's history (1952- present) - Egypt did not witness any strong house of representatives. In 2015 House of Representative elections, there are many allegations that the public intelligence has interfered in the election. Hazem Abdel Azim was a former member of president Abdel Fatah al-Sisi's presidential campaign. He states that "for the Love of Egypt alliance, which won all 120 closed-list seats in the recent parliamentary election, was established under the supervision of Egypt's General Intelligence Directorate and that the meetings about its establishment were held at GID headquarters."⁷⁰³ Besides, the allegation of election fraud during the Mubarak era - which was discussed in chapter one - leads to not relying on legislative body as a supervising power for the judiciary. As consequence, Article 185 increases the notion of the lack of transparency of the judicial authority, rather increasing the judicial independence.

Secondly, there has been a dilemma of the legal status of Attorney General and Public Prosecution Bureau. The current constitution maintained the pure nature of both them. Article 189 of the 2014 Constitution states that "Public Prosecution is carried out by a Prosecutor General who is selected by the Supreme Judicial Council from among the Deputies to the President of the Court of Cassation, the Presidents of the Court of Appeals or the Assistant Prosecutor Generals."⁷⁰⁴ The Attorney General in principle plays a political role that mandates a coming-clean policy. The conservative nature of the judiciary increases the gap between the judiciary and the public. This nature would prevent the prosecution from addressing the public adequately. The Attorney General faces many challenges, like supervising jails, prosecuting corruption cases of senior public officials, and protecting rights. The failure of facing such challenges by a dependant Attorney General is easier than the failure to face them by an independent Attorney General. The responsibility for the incompetent Attorney General in the first case lies with the government, while the responsibility in the second case would lie with the judiciary.

B. The Proposed Amendment for Judicial Independence

In the light of the previous comparison, there are three proposed amendments to the current judicial independence. Firstly, the authority of the Minister of Justice to appoint chairpersons of the primary courts shall be suspended. This authority gives the Minister of Justice the ability to interfere in the outcomes of certain cases through assigning it to certain judges. Instead, the choice of the chairperson shall be subject to the public assembly of each primary court. Members of the public assembly of the primary court can choose their chairperson through general elections of which either any judge in the court can run or the most senior judges.

Besides, the election must be silent to respect the conservative nature of the judiciary and to avoid the disadvantage of the election system in the United States. Silent elections mean that candidates cannot advertise their campaigns; rather, candidates would only depend on their presentation to the public

⁷⁰¹ CONST. EGYPT (2014) §185/1 states that "{a}ll judicial bodies administer their own affairs. Each has an independent budget, whose items are all discussed by the House of Representatives."

⁷⁰² CONST. EGYPT (2014) §185/2 states that "after approving each budget, it is incorporated in the state budget as a single figure."

⁷⁰³ Ahmed Fouad, did Egyptian intelligence meddle in recent elections? Egypt Pulse {January, 01, 2016} <http://www.al-monitor.com/pulse/originals/2016/01/egypt-parliament-accusation-interference-intelligence.html#>

⁷⁰⁴ CONST. EGYPT (2014) § 189/2

assembly regarding their qualifications. Upon the commencement of these presentations, the public assembly would vote for the person who would act as the chairperson for the primary court.

Secondly, the Supreme Judicial Council must be reformulated. The current formulation is prejudiced to fair representation of all members of the judiciary or ranks and fair representation of all regions in the country. The call for reform is not only based on the judicial independence law during the monarchy that included elected members, but also the reform shall include senior law professors, who would represent the conscience of the public as an interim period. The proposed formulation would be as follows: three representatives for the primary courts, three representatives for courts of appeal, three representatives of the court of cassation, two representatives from the junior prosecutor, two representatives of senior prosecutor (including the Attorney General) and five senior law professors chosen from the oldest four law schools (Cairo, Alexandria, Assuit, Ain Shams).⁷⁰⁵

Thirdly, there must be a clear ban on intervention by the Attorney General from the interference in the judicial investigation. In dependent prosecutions, the interference of the Attorney General or his assistant in the investigations is acceptable. However, in independent prosecutions the interference of the Attorney General or his assistant in the investigations is not acceptable. This can be easily achieved through a legislative amendment to consider such intervention a crime.

V. Conclusion

The Egyptian judiciary enjoys a comprehensive form of independence from both executive and legislative authorities. However, there are many questions regarding the authority of the Minister of Justice. This question raises the concern that there is clear misunderstanding of the rule of separation of power and checks-and-balances between the three authorities. The illumination of the authority of the Ministry of Justice would not increase the judiciary's independence. Rather, it would lead to a judiciary that is unaccountable to either the public or other authority.

⁷⁰⁵ In a later stage, this formulation shall include lawyers, and in final stage, it shall include lay-people. It would be very hard to convince judges of the necessity of joining lawyers to the formulation of the Supreme Judicial Council. There will be a lot of resistance especially with the current constitutional formulation that gives the current Supreme Judicial Council the right to ban any law related to the judiciary. Article 185/3 of the 2014 constitution states that "their {judicial institutions} opinion is consulted on the draft laws governing their affairs."

Chapter Four:
Judicial accountability in Egypt:
Towards a new role for the public in the judicial accountability

Outline:

- I. Introduction
- II. Judicial Accountability in Egypt
 - A. Judicial Accountability of Individual Judges
 1. Judicial Conduct and the process of complaints
 2. Proceedings
 3. Disciplinary Actions
 - B. Judicial Accountability of the Judicial Institution
- III. The principle of Judicial accountability in comparative context:
 - A. Judicial Accountability in the Common Law Systems
 - B. Judicial Accountability in Civil Law Systems:
 - C. Accountability in Post Socialist Legal Systems
- IV. Proposed reform to judicial accountability:
 - A. The Current Poser of Judicial accountability and political Participation
 1. Prohibition of political participation of judges
 2. Ambivalence towards prohibition of political participation
 3. The Constitutional Declaration of 2012
 - B. A Proposed Entity to Handle Judicial Inspection in lieu of the Ministry of Justice:
 1. The Supreme Judicial Council
 2. The Independent Judicial Inspection
- V. Conclusion

I. Introduction

Judicial accountability raises three main questions, which are: who is accountable? to whom? and for what?⁷⁰⁶ In any usual case within a democratic system, the answer to the first question would be the judiciary, whether as an institute or individual judges. The answer to the second question would be: accountable to the public, or to other state authorities (legislative and executive). The answer to the third question would be: accountable for legal violations, and improper political participation. This issue takes different dimensions in various countries, where democracy is still underdeveloped.

The absence of separation of powers and “checks and balances”, makes the judiciary a sub-division in the executive authority, rather than an independent body. Such absence of judicial independence, results in diminishing judicial accountability. In other words, the executive authority uses accountability as a tool of retribution, over nonconforming judges.⁷⁰⁷ The domination of the executive authority over judicial accountability is a major challenge against judicial reform. Hence, this chapter argues a need for a role for the public in judicial accountability, unlike the common proposal of transferring judicial accountability to the Supreme Judicial Council.

This chapter has two targets. Firstly, to prove that the current rule of accountability is not adequate, and that it leads to impartiality and arbitrariness against judges in Egypt. With scarcity of literature on this topic, the research is based on the testimony of some members of the judiciary that were made public. Secondly, this chapter answers the question of “if the rules are not effective, what is the solution?” This question will be answered from the comparative law perspective. This research will present accountability rules in five different jurisdictions. This process will help in identifying the best option for the current situation in Egypt.

This chapter consists of three sections. The first tackles the current legal process of judicial accountability in Egypt. This includes complaints, proceedings, and disciplinary actions. The second section discusses the judicial accountability roles in a comparative context. It includes the role of judicial accountability in five different countries: The United Kingdom, The United States, Germany, France and the Russian Federation. The last part of the chapter proposes reform of judicial accountability in light of the comparison and the contemporary challenges in Egypt.

II. Judicial Accountability in Egypt

A. Judicial Accountability of Individual Judges

1. Judicial Conduct and the Process of Complaints

Article 14 of the Supreme Constitutional Court Law (SCCL) states that rules related to their resignation is similar to those of the members of the Court of Cassation.⁷⁰⁸ As for impeachment of members of the court, article 15 of the SCCL states that it is also similar to those of members of the Court of Cassation.⁷⁰⁹ Besides, article 19 further discusses the procedures of such impeachment. The President of the Court takes the necessary action against any member of the court in the case of disintegration of the law, public confidence, or trust.⁷¹⁰ In this case, the President puts forward the allegations to a special committee that examines defense against such allegations. Meanwhile, members in question are on leave with full pay, until a final verdict of the committee is reached.

⁷⁰⁶ Colin Scott, *Accountability in the Regulatory State*, 27 J. L. & SOC 38 (2000), 46

⁷⁰⁷ Philippe Schmitter, *Political Accountability in Real Existing Democracies: Meaning and Mechanisms*, 2 https://www.princeton.edu/.../apsr_abuses.pdf, see also, Ruth Grant and Robert Keohane, *Accountability and Abuses of Power in World Politics*, 1 AMER. POL. SCI. REV. 29 (2005), 30.

⁷⁰⁸ SCC § 14

⁷⁰⁹ SCC § 15

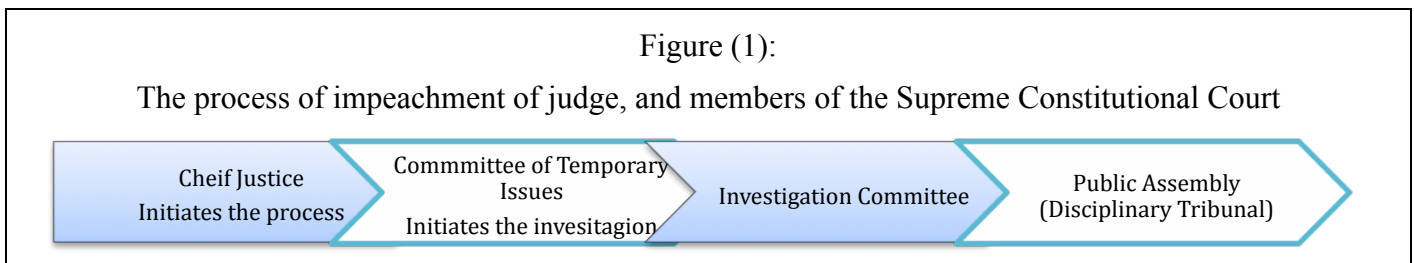
⁷¹⁰ SCC § 20

Currently, the ordinary courts, members of the public prosecution, the Ministry of Justice and the chairperson of the primary court make up the competent authorities in charge of taking disciplinary acts against non-conforming members. This is based on the fact that this group makes up the only competent authority in charge of initiating such a process, before any judge can be brought in front of a Disciplinary Commission, or for trial. Until 2006, the Minister of Justice had full right of supervision over courts and judges. Article 93 of the Judicial Authority Law (hereinafter JAL), before its amendment, stated “the Minister of Justice has full authority to supervise all courts and judges. The Chairperson of the court, and the Public Assembly for each court have the right to supervise judges in their respective courts.”⁷¹¹

In 2006, this article was amended to state “the Ministry of Justice has the right to administrative supervision over courts. The Chairperson of the court and the Public Assembly for each court, have the right to supervise judges in their respective courts.”⁷¹² The constitution has granted an exclusive right to the judiciary to settle disputes related to its members. However, there is a lack of clear definition that prevents the minister or his delegates from interference in judicial independence. This section shall present the unlimited authority of the chairperson of the primary courts in the process of disciplinary acts against the judges.

2. Proceedings

The process of the impeachment in SCC consists of four stages. Firstly, the president of the court brings the case of members who face strong allegations of wrongful and illegal behavior to the “Committee of Temporary Issues” (CTI).⁷¹³ Secondly, the committee examines the right action against those members.⁷¹⁴ It is then left for the committee to decide whether to follow through with the procedures.⁷¹⁵ Thirdly, the CTI selects three members of the Court of Public Assembly or one of the CTI members to investigate the incident, in case it finds enough reason to complete the impeachment process. Fourthly, after the completion of the investigation, results are made accessible to members of the Public Assembly.⁷¹⁶ The public assembly of the court acts as a disciplinary Tribunal, excluding all members of the investigation committee.⁷¹⁷ Finally, the public Assembly hear the member for one last time, before passing the final verdict.⁷¹⁸ Such disciplinary action has not come into force since the establishment of the SCC.



Disciplinary action is initiated by the chairperson of the primary court against members of the ordinary courts and members of public prosecution. The Chairperson of the primary court takes the first step by giving notice to violators, either oral or written. The chairperson of the court is entitled to give a judge

⁷¹¹ JAL § 93

⁷¹² JAL § 93

⁷¹³ SCC § 19

⁷¹⁴ SCC § 19

⁷¹⁵ SCC § 19

⁷¹⁶ SCC § 19

⁷¹⁷ SCC § 19

⁷¹⁸ SCC § 19

such a notice if he/she violates his/her obligations, or job requirements.⁷¹⁹ However, there is lack of clear definition of the term “violate their obligations or requirement of their job.” Keeping the door open for arbitrary decisions is a major challenge with oral notices.

A transcribed notice is, considered a harsh form of warning to be given to a judge. There are several differences between oral and transcribed notices. Firstly, the oral notice does not have any effect on professional progression of the judge, while a documented notice is a mark of misdemeanor in his/her file. Secondly, there is a big chance that a transcribed notice is issued by the Ministry of Justice, and the chairperson of the primary court, while the oral notice is only given by the chairperson of the court.⁷²⁰

The JAL did not identify specific cases and violations, where a chairperson issues an oral or written notice. As a consequence, this practice facilitates impartiality and arbitrariness. The chairperson of the primary court can issue a notice of violation against certain members; while refrains from so doing with others affiliated with the ideology of the government. This discrimination was hard to prove before 25th of January Revolution in 2011. It is nowadays more feasible and easier to establish an evidence for such discrimination. This evidence would be tackled in the next section of the chapter. It will highlight discrimination between judges affiliated with the Muslim Brotherhood, and those against it.

The second division is the Judicial Inspection Department {hereinafter JID} at the Ministry of Justice. JID is the strong arm of the Ministry of Justice to control the judiciary. Until 2006, the Minister of Justice was the only competent authority to nominate the president of the JID, who additionally bears the responsibilities of Assistant to the Minister of Justice. Article 45 states that the nomination of the presidents, vice presidents and members of legislation department, judicial inspection department, divisions of the court, judicial inspection for prosecution bureau, and prosecution administration are nominated by members of judiciary or the prosecution bureau. The nomination is renewable for one year. The Ministry of Justice is the sole competent authority of nomination, after permission of the JSC.”

The current nomination process has not changed much. It did not transfer the JID from the Ministry of Justice, to the Judicial Supreme Council {hereinafter JSC}, as per the proposed amendment. The ex-Minister of Justice during the last amendment of the law stated in one of his interviews “Ex-president (Hosni Mubarak) refused to change the supremacy of the SJC from the Ministry of Justice, to the SJC.”⁷²¹ This is why the new amendment is not to be considered real reform.⁷²² This was a brief development of JID during the last ten years. The JID is responsible for maintaining judges’ records and personal files that are used for their promotion, transfer, and disciplinary action. It is the reference used for any disciplinary action, except for oral notices.⁷²³ The JID has the sole jurisdiction over starting any disciplinary action. The disciplinary commission cannot initiate any punitive action, unless initiated by the JID.

The JAL has regulated two types of investigations. The first is criminal investigation, which was tackled in the previous chapter as part of the immunity of the judges. The second type of investigation combines civil and administrative investigations, which are the starting point of the impeachment process against judges. It is worth nothing that criminal investigation does not lead, by necessity, to

⁷¹⁹ JAL § 94

⁷²⁰ JAL § 94

⁷²¹ Men ajl Mish: Minister of Justice Mahmoud Abo al-Lil (YouTube) (2011)

(https://www.youtube.com/watch?v=Qnf43GP-0_E)

⁷²² JAL § 46 states “the nomination of the assistant to the Minister for the judicial inspection, and his assistance, and members of the department of judicial inspection is done by the Minister of Justice, and only after permission of the Supreme Judicial Council.”

⁷²³ JAL § 78

impeachment. Conversely, administrative investigation might. Hence, the following paragraphs will only tackle the process of the civil investigations against judges.

The Minister of Justice nominates a judge to investigate violation committed by another. The nominated judge shall be in a rank, either equal or senior than the judge in question. He should be at the rank of vice president of the court of cassation, or president at the court of appeal, if the judge is at the rank of judge at the court of appeal, or at the court of cassation. If the judge is a member of the primary court, the investigating judge should be a judge at the court of appeal, or the court of cassation.⁷²⁴ At the conclusion of the preliminary investigation, a copy of the report shall be submitted to the Attorney General's Office. The Attorney General has to submit his motion within 30 days of receiving the request for trial.

The Disciplinary Commission consists of the third senior justices of the Court of Appeal, the two most senior vice presidents of the Court of Cassation, and the two most senior justices in the Court of Appeal. This formulation depends mainly on the seniority of the judges of both the Court of Appeal, and the Court of Cassation. In the case if any senior-ranking judge has any problem attending the commission, he shall be replaced by the next in command. So, if the second most senior vice president in the Court of Cassation was unable to be present, he will be replaced by the third senior vice president of the Court of Cassation.

Proceedings of the disciplinary Commission are the same as that of a trial process. While the defendant presents his defense, the Attorney General presents the people's claim against the judge. Each presents his argument and attempts to prove his point of view to the respective decision-making commission. As the defendant tries to prove his innocence, the Attorney General conversely tries to prove otherwise. The Attorney General usually does not attend these sessions, unless during the impeachment of judges. He usually delegates one of his assistants to replace him. Even though the JAL rules mandate presence of the Attorney general, sessions would still be held with the presence of any of his aides.⁷²⁵ This is based on the fact that the prosecution bureau is one unit; where one member can replace the other. There is a lack of any serious safeguard measures to protect judges from the arbitrary behavior of their colleagues in the Ministry of Justice. During the trial, the judge has the right to have a public defender, a judge who is willing to represent him in the trial.⁷²⁶ Unlike the general rule of public trials, proceeding of the trial are closed; while the session for announcing the final verdict is public.

3. Disciplinary Actions

There are two types of punitive sanctions that can apply to a judge who is found guilty of wrongful behavior. These sanctions are either bargaining or forced sanctions. The bargaining sanction is an impeachment option. It is mentioned in the JAL and Civil Servant Law. Article 104 states that a judge can choose to stop the disciplinary procedures if two things take place. The first is the judge's resignation, and the second is reaching the age of retirement.⁷²⁷ As for the latter option, the legislator maintains that at this point, JID would lose the element of "interest" for prosecution. The disciplinary process to impeach a judge is to force him leave the judiciary. In the case of a judge who reaches the age of 70, already fulfills this criterion. Hence, there is no reason to proceed with the option of impeachment.

Resignation it is a result of negotiations between the Judicial Inspection Committee, and the judge in question. Negotiations are not clearly indicated in the law. However, the legislator has maintained this

⁷²⁴ JAL § 99

⁷²⁵ In the proceeding against the "Judge for Egypt," the Attorney General did not attend the sessions of the court. He delegates his assistant to attend these sessions. *See in that regard*, investigations

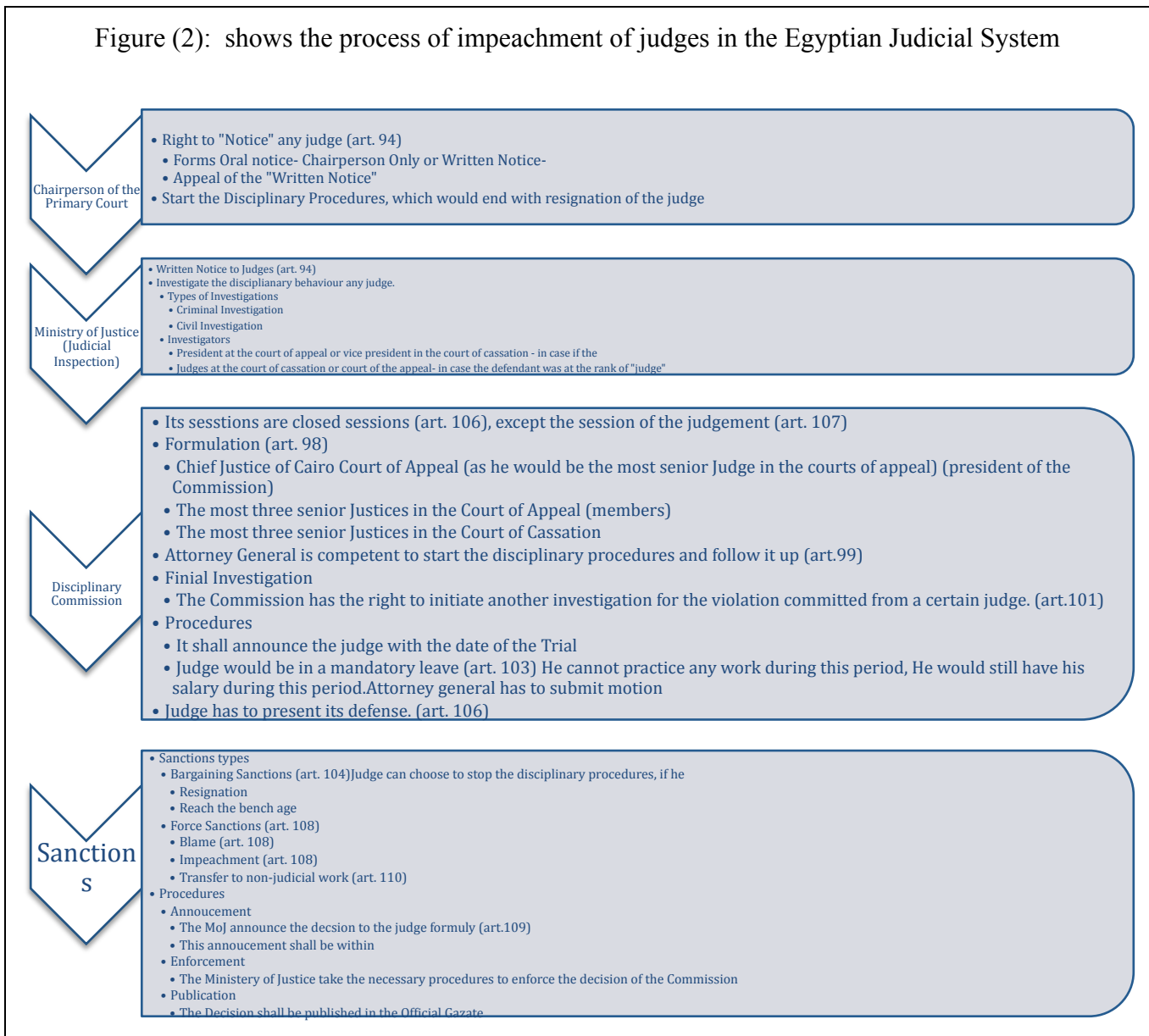
⁷²⁶ JAL § 106

⁷²⁷ JAL § 104

type of sanctions for two reasons. Firstly, it was practiced to find middle ground for judges, who are subjected to a punitive action. The judicial community is very small and centralized, thus judges in question would be subject to shame due to their wrongful behavior. That is why judges have always resorted to resignation, rather than impeachment. Secondly, one of the consequences of impeachment is the suspension of pension, as per the Civil Egyptian Labor Law. For this reason, if the JID finds strong incriminating evidence against a judge, it offers him the option to resign (instead of impeachment), so that he can benefit from his pension plan.

As for the enforced sanctions (art. 108 and 110), there are three types, which are charging the judge, transferring to non-judicial work, or impeachment. However, the judicial Authority law did not specify the cases for each sanction. It is left it to the discretion of the disciplinary commission to determine which sanction is more suitable for each act. This chapter shows how the disciplinary commission established a precedent of impeached judges, who violated the JAL rules in regards to political participation.

Figure (2): shows the process of impeachment of judges in the Egyptian Judicial System



B. Judicial Accountability of the Judicial Institution

There was great effort taken to transfer JID from the Ministry of Justice to the Judicial Supreme Council. The Egyptian Constitution maintained the guidelines against improper intervention in the judicial decision-making. Article 184 of the Constitution states “interference in judicial affairs, or in their proceedings is a crime to which no statute of limitations may be applied.”⁷²⁸ However, all such endeavors failed, and no more were initiated to change the present situation. The two most significant incidents to change the current situation were taken before the military coup in July 2013. The first incident took place when the Minister of Justice Ahmed Mikky sent a formal letter to the Supreme Judicial Council on the transfer of the JID to them. The letter stipulated “

Chancellor/The Chief Justice of Court of Cassation and the Chairman of the Judicial Supreme Council... Since I have the honor to be a member of the Judiciary, I shared with my colleagues the utmost necessity to transfer JID from the Ministry of Justice to the Supreme Judicial Council... As per our last meeting, I heard that you would nominate Chancellor Zaghoul al-Balushi to be the new chairperson of the Judicial Inspection Committee. I have not only agreed with your nomination, but also starting today I would like to inform you the transfer of the JID to the SJC is now in effect. I wish also to ask your acceptance of his nomination to be Assistant to the Minister of Justice until the promulgation of a new law, which would attach the JID to your Council. Please accept my sincere regards to your SJC, the new chairperson of the JID, and all our colleagues.⁷²⁹

The President of the Judicial Supreme Council has declined the request to transfer JID. It was based on the fact that he council could not accept such a transfer unless with an amendment to the Judicial Authority Law.⁷³⁰ This was the golden opportunity for the judiciary to make a factual transfer of JID. Most of the judges, and being one of them myself, have felt betrayed by the Supreme Judicial Council. It was very hard at that time to amend the Judicial Authority law due to existing political hurdles. Such bitterness has led to the proposition of another solution. This research proposes that judicial inspection be part of an independent commission to be elected among the various ranks. There was a predominant feeling of fear that the Judicial Supreme Council would can become another arm to the executive authority, especially when the government uses the ‘carrot and stick’.

The current status of the judiciary in Egypt is quite puzzling. This is a result of the promulgation of more than three constitutions in less than 5 years. These Constitutions are March 30th, 2011 Constitution (Military Council Constitution), December 22nd, 2011 Constitution (Muslim Brotherhood Constitution), as well as January 15th, 2014 Constitution (military coup Constitution). There are also many other constitutional declarations issued during this period, leading to more confusion and puzzlement. An example is President Mohamed Morsi’s Constitutional Declaration.

The Constitutional Declaration of 2012 has limited the years of office for the Attorney General to only four years. This declaration was made to force the resignation of the Attorney General Abdel Majed Mahmoud, who was in office since 2006. Abdel Majed Mahmoud was supposed to be in office until his date of retirement in 2016. This declaration has increased aggression of the executive authority against judicial independence. It bestowed immunity to the lower house of the Parliament after the Supreme Constitutional Court has dissolved the Upper House for the nullification of the election law. Article IV states “no judicial body can dissolve the *Shura* Council (Lower house of the Parliament) or the constituent Assembly.”⁷³¹

⁷²⁸ EGYPT CONST. § 184

⁷²⁹ Letter of the Minister of Justice to Chief Justice to the Supreme Constitutional Court (2012)

(<http://new.elfagr.org/Detail.aspx?newsId=167356&secid=1&vid=2>)

⁷³⁰ al-Qada Al’al: lan nosherf ‘la al-Tafish down qanwan (2012), (<http://m.almasryalyoum.com/news/details/157553>)

⁷³¹ EGYPT CONST. DECLAR. (2012) §IV.

This confusion has led to increasing instability, since the present constitution has stopped further proposition for reform. The status-quo is considered the best position to any regime to maintain its strong influence over judicial decisions. With a clear lack of separation of power in contemporary Egypt, it is hard to say there is impartial and independent mechanism, to ensure either judicial independence, or accountability.

III. Judicial Accountability in a Comparative Context:

A. Judicial Accountability in the Common Law Systems

In the United States of America, accountability is one of six core values of the American judiciary system, they are: “stringent standards of conduct; self-enforcement of legal and ethical rules; good stewardship of public funds and property; effective and efficient use of resources.”⁷³² Judges are accountable to the people on both the professional and personal levels.⁷³³

The selection of judges in the US, at least in the majority of the states, is based on election.⁷³⁴ While the definition of judicial accountability is not a clear concept in the US legal system, it is always connected to either the public view of judicial decision, or judicial performance in general form.⁷³⁵ This section will highlight the current debate whether this process is outcome-oriented or process-oriented. It is limited to presenting the current debate in the US legal system without bias to any of these processes. The section would start with the issue of accountability in the federal level, then will proceed to discuss accountability on the state level.

On the federal level, the Constitution mandates “good behavior” of the judicial power. Article III Section 1 stated “The judicial power of the United States, shall be vested in one supreme court ... judges ... shall hold their offices, and during scheduled times, shall receive for their services a compensation, which shall not be reduced during holding office.”⁷³⁶

The question of impeachment on the federal level, is clearer than that on the national level. Article I, section 3, clause 6 deals with the proceedings of impeachment. It states “{T}he Senate has the sole power to try all impeachments, while being under oath. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the concurrence of two thirds of the members present.”⁷³⁷

The US Supreme Court has settled several principles in this regard. In *Nixon v. US*, The court held that “the senate had sole discretion to choose the impeachment procedures.” The chief judge of the federal district court was prosecuted and sentenced to prison for false statements before a federal grand jury.⁷³⁸ After hearings in the Senate, they voted in favor of Nixon’s conviction and impeachment.⁷³⁹ The Court also maintained its position of Hamilton on judicial accountability as such:

The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for mal-conduct by the House of Representatives, and tried by

⁷³² Administrative oversight and accountability, Federal Courts, United States Courts,

<http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/administrative-oversight-accountability.aspx>

⁷³³ Paul De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 28 Willamette L. Rev. 367 (2002), 387.

⁷³⁴ Alex Long, Stop Me Before I vote for this judge again: Judicial Conduct Organizations, Judicial Accountability ad the Disciplining of elected Judges, 106 W.VA.L.REV.1 (2003), 4

⁷³⁵ Rebecca Love Kourlis and Jordon M. Siger, *Using Judicial Performance Evaluations to Promote Judicial Accountability*, 90 JUDICATURE 200 (2007), 202

⁷³⁶ USCA § III § 1 cl. 1

⁷³⁷ USCA § III § 1 cl. 6

⁷³⁸ 506 US 224 (1993)

⁷³⁹ 506 US 226 (1993)

the senate, and if convicted, may be dismissed from office and disqualified for holding any other. *This is the only provision on this point, which is consistent with the required independence of judicial character, which we find in our constitution, and in respect to our own judges.*⁷⁴⁰

On the state level, growing politicization of judicial decisions, appointment, and management face a great challenge with the scarcity of budget resources.⁷⁴¹ The first question that was raised was the accountability of justices in the US legal systems, mainly: to whom are the judges accountable? Are they accountable to the governor, who chose them, the chief justice of the state supreme court, who administers their work, or the state legislature? There is no general answer to this question in judicial literature.⁷⁴²

Courts ruling based on reasons other than law/facts, or based on political bias would open the door for more criticism, as in passing judgments of political nature affects judicial independence, rather than help it.⁷⁴³ Georgia and Mississippi were the earliest states to appoint judges through democratic selection criteria.⁷⁴⁴ Meaning of judicial accountability takes different shapes and forms on the state level.⁷⁴⁵ A major part of it is about judicial selection, and means of nomination, which will be discussed in chapter five. In California, the Supreme Court of California maintained in *People vs. Bonnetta*'s that "the purpose for requiring a court to state reasons for a dismissal, is to promote judicial accountability, as well as protect public interest in eliminating improper dismissals."⁷⁴⁶

Finally, judicial accountability in the United States mandates that Judges are subject to political outbreaks during political campaign. Professor Yoo does not see a problem in criticizing judges, he maintains that they have to face real life, and take responsibility for their actions and decisions. As long as there is no misuse of impeachment or judicial independence safeguards, there is no problem in criticizing federal judges.⁷⁴⁷ If federal judges were unable to accept political reproach, they should refrain from accepting their position in the first place.⁷⁴⁸

In the United Kingdom, the separation of power was greatly impacted by the Constitutional Reform Act in 2005.⁷⁴⁹ The act has endowed Lord Chancellor, a governmental minister and the head of the judiciary, with a new position of Lord Chief Justice.⁷⁵⁰ The Act created a new Supreme Court,⁷⁵¹ and judicial appointment commission.⁷⁵² The principle of judicial accountability is divided into two distinct meanings: institutional accountability of the judiciary, and personal accountability of individual

⁷⁴⁰ 506 US 235

⁷⁴¹ Richard Schauffler, *Judicial accountability in the US State Courts Measuring Court Performance*, 3 UTRECHT L.REV. 112 (2007), 112

⁷⁴² *Id* at 118

⁷⁴³ Paul De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 28 Willamette L. Rev. 367 (2002), 387.

⁷⁴⁴ Joanna Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L. J. 623 (2009), 631

⁷⁴⁵ Andrea McArdle, *The Increasingly Fractious Politics of Nonpartisan Judicial selection: Accountability Challenges to merit-based Reform*, 75 ALB. L. REV. 1799 (2011-2012) 1801.

⁷⁴⁶ 92 Cal. Rptr 3d 381 (2009)

⁷⁴⁷ *Supra Note 466*

⁷⁴⁸ *Id 466*

⁷⁴⁹ Constitutional Reform Act 2005

⁷⁵⁰ §2 Constitutional Reform Act 2005

⁷⁵¹ §3 Constitutional Reform Act 2005

⁷⁵² §4 Constitutional Reform Act 2005

judges.⁷⁵³ This section will present personal accountability of individual judge, and then will move on to discuss accountability of the judiciary as an institution.

Judicial accountability has two forms: ‘sacrificial accountability’ and ‘explanatory accountability.’⁷⁵⁴ Sacrificial accountability is when a judge commits a criminal act. Unlike the situation in the US, a judge would be subject to criminal investigation from the office of judicial complaints, where he/she would later be subject to disciplinary sanctions.⁷⁵⁵

Explanatory accountability, is investigating actions of the judge, and reasons for his/her behavior.⁷⁵⁶ The Lord Chief Justice and the Lord Chancellor are both responsible for investigating any complaints on this type of behavior.⁷⁵⁷ They have jurisdiction over personal conduct of English and Welsh judges.⁷⁵⁸ The Office for Judicial Complaints (OJC), currently called Judicial Complaints Investigations’ Office, is the office competent to handle this type of complaints.⁷⁵⁹ They are both considered independent bodies of the judiciary.⁷⁶⁰ This process is to guarantee public confidence in the process of accountability across the United Kingdom.⁷⁶¹

The Judicial Conduct Investigations Office issues an annual report including the number of complaints received. In 2013-2014, the number of full and part time judiciary was estimated to be 36,000, of which 29,000 are magistrates and 7,000 are tribunal members.⁷⁶² The total number of formal disciplinary action taken was 58 cases; out of the total number of 2018 complaints.⁷⁶³ Complaints are first screened by the judicial conduct investigation office. If the complaint falls within its limits of the disciplinary system, the case is thus referred to the Office of Judicial complains.⁷⁶⁴ The following table shows the type of complains and their numbers:

Figure (3)

Shows the complains types and its numbers

Complaint Type ⁷⁶⁵	Number of Complaints	
	JCIO (Judicial Conduct Investigation Office)	OJC (Office of Judicial Complain)
Not Specified	63	
Conflict of Interest	9	4

⁷⁵³ The Principle of Judicial Accountability, Courts and Tribunals Judiciary, (2014) (<http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/principles-jud-acc/>)

⁷⁵⁴ *Id*

⁷⁵⁵ *Id*

⁷⁵⁶ *Id*

⁷⁵⁷ Judicial Conduct, Courts and Tribunals Judiciary, (2014) (<http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/jud-conduct/>)

⁷⁵⁸ *Id*

⁷⁵⁹ *Id*

⁷⁶⁰ *Id*

⁷⁶¹ *Id*

⁷⁶² Judicial Conduct Investigation Office, Annual Report 2013-2014 (http://judicialconduct.judiciary.gov.uk/documents/jcio_annual_report_2013_-2014.pdf)

⁷⁶³ *Id*

⁷⁶⁴ *Id*

⁷⁶⁵ *Id*

Court Proceedings and Criminal Convictions	3	-
Discrimination	23	-
Inappropriate Behavior or Comments	343	253
Bankruptcy	-	4
Civil Proceedings	-	1
Judicial Decision or Case Management	688	502
Misuse of Judicial Status	10	-
Motoring Offences	1	-
Not Fulfilling Judicial Duty	52	-
Not Related to Judicial Office Holder	10	-
Professional Conduct	20	-
Miscellaneous	32	
Total	2,018	

The judiciary as an institution, offers three forms of activities: interviews and media briefings, the Lord Chief Justice's Review of the administration of justice in courts, in addition to court reports.⁷⁶⁶ As for interviews and media Briefings, judges occasionally give interviews to the media. Some comments call for disciplinary action that can even reach impeachment. In a statement from the Judicial Conduct Investigations' Office on a certain magistrate:⁷⁶⁷

He wrote to a national newspaper, and spoke on a radio program detailing a particular case, an action that could have easily led to identification of the defendant in question. The Lord Chancellor, and the Lord Chief Justice concluded that this behavior amounted to serious misconduct, leading to removal from the magistracy, had she not voluntarily resigned.

Since 2008, the Lord Chief Justice started to publish a periodical review of judicial matters.⁷⁶⁸ The report aimed to identify issues of major concern to the judiciary, and justice administration in the United Kingdom.⁷⁶⁹ As for court reports, each court has to provide an annual report on their

⁷⁶⁶ Other Form of Accountability, Courts and Tribunals Judiciary, (2014) (<http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/other-forms-of-accountability/>)

⁷⁶⁷ Statement JCIO 57/14, The Judicial Conduct Investigations Office, (14 October 2014)

(http://judicialconduct.judiciary.gov.uk/documents/JCIO_press_statement_-_Mrs_Amanda_Cornick_JP.pdf)

⁷⁶⁸ *Supra note 766*

⁷⁶⁹ *Id*

“performance throughout the year.”⁷⁷⁰ This report includes “commentary from the local resident judge, the designated Civil or Designated Family Judge.”⁷⁷¹

B. Judicial Accountability in Civil Law Systems:

Firstly, judicial accountability in France has not any formal course of action of filing a complaint, or calling for disciplinary action against a judge in France.⁷⁷² The familiar process is to submit a complaint to the national Ombudsman (*Mediateur de la Republique*).⁷⁷³ The complaint would be reviewed first by an Ombudsman associate, or one of the Parliament members, before taking the complaint to the next level.⁷⁷⁴ Additionally, the disciplinary action is not limited to intentional professional negligence, it also investigates the private conduct of judges’ personal lives.⁷⁷⁵ Judges and prosecutors do not represent themselves; they represent the institution they belong to, the judiciary. Theft and alcoholism, among other acts, constitute a violation of judges’ “obligations of private life.”⁷⁷⁶ Finally, errors in interpreting or applying the law are not considered as a reason for a disciplinary action against judges or prosecutors.⁷⁷⁷

On the second level, the constitution determines the rules that govern the formulation of the disciplinary committee. In this regard, the constitution differentiates between judges and prosecutors. For judges, article 65, paragraph 5 of the constitution states:

The section of the high council of the judiciary with jurisdiction over judges shall make recommendations for the appointment of judges to the Cour de Cassation, the chief presidents of Court of Appeal, as well as the presidents of the tribunaux de grande instance. Other judges shall be appointed after consultation with this section. This section shall act as disciplinary tribunal for judges. When acting in such capacity, it shall be presided over by the chief president of the Cour de cassation⁷⁷⁸

As for prosecutors, article 65, paragraph 6 of the constitution states:

The section of the high council of the judiciary with jurisdiction over public prosecutors shall give its opinion on the appointment of public prosecutors, with the exception of posts to be filled at meetings of the Council of Ministers. It shall give its opinion on disciplinary measures regarding public prosecutors. When acting in such capacity, it shall be presided over by the chief public prosecutor at the cour de cassation.⁷⁷⁹

Once the committee is sworn in, the judicial ordinance gives the judge or the prosecutor several safeguards against arbitral decisions, or unfair trials. Judges and prosecutors, who are charged with disciplinary action (defendants), are entitled to full access to evidence, and files relevant to their cases.⁷⁸⁰ Secondly, the defendant is also entitled to have a lawyer for his defense.⁷⁸¹ Thirdly, the defendant is not entitled to any form of search or seizure from this committee. His/her house and

⁷⁷⁰ *Id*

⁷⁷¹ *Id*

⁷⁷² *Id* at 289

⁷⁷³ *Id* at 289

⁷⁷⁴ *Id* at 289

⁷⁷⁵ *Id* at 290

⁷⁷⁶ *Id* at 290

⁷⁷⁷ *Id* at 291

⁷⁷⁸ FRANCE CONST. § 65/5

⁷⁷⁹ FRANCE CONST. § 65/6

⁷⁸⁰ *Supra note* 533 at 291

⁷⁸¹ *Id* at 291

property are protected against any violation, as part of the immunity endowed to judges and prosecutors in France.⁷⁸²

One of the most important safeguard measures is that decision taken by the committee are additionally reviewed by the *Conseil d'Etat*, the entity responsible for administrative disputes.⁷⁸³ The significance of such a body lies in the integration between the two systems of ordinary courts, and administrative courts. It also offers a high level of protection against arbitrary decision, as a result of previous disputes between the committee, and the judge in question.

In these cases, the *Conseil d'Etat* would act as *juge de cassation* if the defendant is a judge, while act as *juge de l'exces de pouvoir* in case the defendant is a prosecutor.⁷⁸⁴ It would review the legality of the decision, and whether it complies with constitutional and legal guidelines. Moreover, it would check whether sanctions are not “clearly disproportionate to the offences.”⁷⁸⁵

Article 45 of *Ordinance 58-1270* states the sanctions that can be imposed on judges. They include: reprimand, transfer, exclusion from certain tasks, demotion, compulsory retirement, and dismissal with or without pension rights.⁷⁸⁶ In practice, it is hard to take action against judges for many reasons. Firstly, guarantees and safeguards offered to members of the judiciary make it a hard task to process unless for a serious violation. This gives an impression to the public that they are a special class of people.⁷⁸⁷ Secondly, the debate still examines ways to get around the various proceedings surroundings members of the judiciary. However, until today, attempts failed since these guarantees are mentioned in the constitution, not in the ordinance.⁷⁸⁸

Judicial accountability in Germany is set up to hold its members accountable, and be in connection with the other branches of the government.⁷⁸⁹ It is set up to maintain democratic accountability before the parliament, and through judicial selection and administration.⁷⁹⁰ The Minister of Justice plays a major role in both judicial administration and judicial selection. Article 20/2 of the Basic Law states “{a}ll state authority is derived from the people.”⁷⁹¹ This article shows that all the authority, which includes the judiciary, comes from the people, and thus requires that these authorities (judiciary) are accountable and liable to them.⁷⁹²

The president of the court oversees the work of judges.⁷⁹³ However, his supervision should not contradict with their independence. Based on sections 25 and 26, section 25 ensures independence of the judge, and that he/she is subject only to the law. Section 26 sets two types of limitations over such supervision. Firstly, judges shall only be subject to the supervision as long as it does not contradict with their independence.⁷⁹⁴ Secondly, in case the judge believes that the supervisory measurement prevents him/her from practicing judicial independence, the judge “contends that a supervisory measure detracts from his independence a court shall, on application being made by the judge, give a ruling in

⁷⁸² *Id* at 291

⁷⁸³ *Id* at 292

⁷⁸⁴ *Id* at 292

⁷⁸⁵ *Id* at 292

⁷⁸⁶ *Ordinance 58-1270* § 45.

⁷⁸⁷ *Supra note* 533 at 292

⁷⁸⁸ *Id* at 292

⁷⁸⁹ *Id* at 369

⁷⁹⁰ *Id* at 369

⁷⁹¹ GERMANY CONST. § 20/2

⁷⁹² Anja Seibert-Fohr, *Judicial Independence in Germany*, ANJA SEIBERT-FOHR (ED), *JUDICIAL INDEPENDENCE IN TRANSITION*, 451 (Springer 2012)

⁷⁹³ *Id* at 384

⁷⁹⁴ GERMANY FEDERAL JUDICIARY Act § 26/1

compliance with this Act.”⁷⁹⁵ Article 98 paragraphs 2, 3 and 4 concerning the legal status of judges, with reference to impeachment.⁷⁹⁶

As for safeguard measures, the Federal Service Court (*Dienstgericht des Bundes*) in the Federal Court is the authority competent to hear all disciplinary hearings against judges in Germany. The jurisdiction of the Federal service court is tackled in section 62. It includes decisions in the “disciplinary matters related to the judges in retirement.”⁷⁹⁷ Article 98/5 states one of the most stringent safeguards in the case of impeachment of a judge. It states “{t}he Länder may enact provisions regarding Land judges that correspond with those of paragraph (2) of this Article. Existing Land constitutional law shall not be affected. The decision in cases of judicial impeachment shall rest with the Federal Constitutional Court.”⁷⁹⁸

Finally, disciplinary sanctions are mentioned in Section 64 of the Federal Judicial Act. It limits disciplinary measures to only reprimand.⁷⁹⁹ As for justices of the Supreme Court of the Federation, they are subject to “reprimand, a regulatory fine or removal from office.”⁸⁰⁰ The general rule states that the system in Germany does not permit any judicial interference from either the executive or the legislative bodies. However, there is still theoretical hypothesis that there is indirect influence over the judiciary in Germany. The issue of appointing the judges of the supreme Federal Court from the legislative body raises that question. The conflict is whether to ensure a full autonomy of the judiciary over the judicial institution, or to give checks and balance to ensure accountability of the institution. This conflict would not be easily solved in the near future in Germany.

C. Accountability in Post Socialist Legal Systems:

Judicial Accountability in the Russian Federation has passed several stages. Before 2001, there was no formal method to govern the disciplinary responsibility of the judiciary in the Russian Federation.⁸⁰¹ Immunity rules endowed to members of the judiciary mandate certain actions that are subject to disciplinary responsibility. In 2001, the President introduced some reform in immunity rules, to hold judges accountable for their acts.⁸⁰²

There are two methods to initiate measures of disciplinary proceedings. Firstly, chairperson of the court is the only competent body authorized to initiate disciplinary proceedings.⁸⁰³ This is the most common way of holding judges accountable. Secondly, individuals are also able to initiate the procedures, if they submit their complaints to the *Qualification Collegium*.⁸⁰⁴ Anonymous complains shall not be

⁷⁹⁵ GERMANY FEDERAL JUDICIARY Act § 26/3

⁷⁹⁶ GERMANY CONST. § 98/2,3,4 states that 2) If a federal judge infringes the principles of this Basic Law or the constitutional order of a Land in his official capacity or unofficially, the Federal Constitutional Court, upon application of the Bundestag, may by a two-thirds majority order that the judge be transferred or retired. In the case of an intentional infringement it may order him dismissed. (3) The legal status of the judges in the Länder shall be regulated by special Land laws if clause 27 of paragraph (1) of Article 74 does not otherwise provide. (4) The Länder may provide that Land judges shall be chosen jointly by the Land Minister of Justice and a committee for the selection of judges

⁷⁹⁷ GERMANY FEDERAL JUDICIARY Act § 62/1

⁷⁹⁸ GERMANY CONST. § 98/5

⁷⁹⁹ GERMANY FEDERAL JUDICIARY Act § 64

⁸⁰⁰ GERMANY FEDERAL JUDICIARY Act § 64

⁸⁰¹ Olga Schwartz and Elga Sykiainen, *Judicial independence in the Russian Federation*, ANJA SEIBERT-FOHR (ED),

JUDICIAL INDEPENDENCE IN TRANSITION, at 1021

⁸⁰² *Id* at 1022

⁸⁰³ *Id* at 1022

⁸⁰⁴ *Id* at 1023

considered further into an investigation against a judge.⁸⁰⁵ The *Qualification Collegium* has the authority to decide the viability of complaints against judges.⁸⁰⁶

The process of evaluating an offence is still unclear. It lacks fairness and the presence of any legal rule. Article 12/1 of the law on the status of judges states “If a judge commits a disciplinary offence, i.e a culpable act in the performance of professional duties, or in extra occupational activities, violating the provisions of this law and the provisions of the Code of Judicial Ethics, adopted by the All-Russian Congress of judges, leads to diminishing authority of the judiciary and harms the reputation of the judge.”⁸⁰⁷

The article used two vague terms “diminishing authority of the judiciary” and “harms the reputation of a judge.”⁸⁰⁸ Based on that, the authority of the *Qualification Collegium* is very broad and lacks a precise definition of terms. It practices great discretion in “the removal of those judges who became unwanted by the judicial community.”⁸⁰⁹ In the clear absence of judicial independence, which was tackled in the previous chapter, the authority becomes a tool in the hand of the executive power to remove any judge, who was unable to comply with the executive guidelines.

The chairperson of the court is the competent authority to initiate the preliminary investigation against any judge. Investigations are not free from bias, though.⁸¹⁰ Bias will not amount to submitting false evidence for fear of blemished reputation, though it takes other forms.⁸¹¹ The *Qualification Collegium* initiates its own investigation after the receipt of the complaint, even though it normally supports the chairperson’s recommendation.⁸¹² The *Qualification Collegium* has the final say in issuing disciplinary procedures. It can choose to proceed with the investigation, or to reject such allegations totally.⁸¹³ In case of proceeding with the complaint, the *Qualification Collegium* establishes a “special commission, consisting of some of its members, members of the council of judges, as well as the *Collegium*’s staff and public representatives.”⁸¹⁴ This measure is taken to eliminate any form of bias.

On the other hand, there are no clear rules to identify the number of commission members, its function, how it reaches its decisions, or its supremacy.⁸¹⁵ This contributes to the vagueness between executive, and judicial authorities. The more inexplicit the rules are, the more intervention is required in the work of the judiciary. Finally, once the *Qualification Collegium* reaches a decision, it is announced to the chairperson of the competent court, whether to files charges, or to dismiss the case.

Once the investigation starts, the judge has the right to “review materials collected beforehand, and submit his/her objection and comments.”⁸¹⁶ He/she will have the right to submit motions, be present before the *Qualification Collegium*, and the right to have council.⁸¹⁷ Procedures are subject to public

⁸⁰⁵ *Id* at 1023

⁸⁰⁶ *Id* at 1023

⁸⁰⁷ LAW ON THE STATUS OF JUDGES § 12/1

⁸⁰⁸ LAW ON THE STATUS OF JUDGES § 12/1

⁸⁰⁹ Olga Schwartz and Elga Sykiainen, *Judicial independence in the Russian Federation*, ANJA SEIBERT-FOHR (ED), JUDICIAL INDEPENDENCE IN TRANSITION, at 1023

⁸¹⁰ *Id* at 1024

⁸¹¹ *Id* at 1024

⁸¹² *Id* at 1024

⁸¹³ *Id* at 1025

⁸¹⁴ *Id* at 1025

⁸¹⁵ *Id* at 1026

⁸¹⁶ *Id* at 1027

⁸¹⁷ *Id* at 1027

hearing, while voting does not fall under the same rule.⁸¹⁸ The decision is published on the website of the Collegium, to allow transparency and public access to the procedures.⁸¹⁹

In case a judge has any objection against the disciplinary decision; he/she can appeal the verdict. There are two levels of appeal against the decision taken by the *Qualification Collegium*.⁸²⁰ The first is the Supreme *Qualification Collegium*, or the court of general jurisdiction at the regional level. It is the competent court with the appeal initiated by judges.⁸²¹ The second step is filing an appeal to the Supreme Court of the Russian Federation. Recently, the judicial disciplinary tribunal has been established to appeal the “decision of *Qualification Collegia* on the termination of judicial powers by reason of the commission of a disciplinary offence.”⁸²² Besides, the Chairman of the higher courts can appeal the decision in front of such Tribunal, in case of finding strong reason for impeachment.⁸²³

The introduction of the new tribunal arguably assisted judicial independence in the Russian Federation. This is based on the manner judges of this tribunal are chosen, which is voting by secret ballot.⁸²⁴ However, there is insufficient argument to maintain that this tribunal is impartial and objective. Members of the tribunal are judges, appointed by the executive authority without any “check and balance” by the legislative body. Like in the US, the president, as discussed earlier, is the only body competent to nominate the judiciary, while the Congress has the power of impeachment.

As for the disciplinary sanctions, article 12/1 of the law on the status of judges regulates disciplinary sanctions imposed. It states “a disciplinary punishment of authority of the judiciary and harms for a judge of the constitutional court of the Russian Federation in the form of 1) notice, 2) warning, 3) removal.”⁸²⁵ The article stipulates more details about some cases, and the type of sanction imposed. Accountability of the judicial institution as a whole is not applicable, due to undeveloped judicial independence in the Russian Federation. Even though the current constitution states that the judiciary is independent, practice proves the contrary. The clear intervention of the president in the affairs of the judiciary, the representation of the executive authority, weakens any form of independence. The president is authorized to nominate judges and chairpersons of each court, leading to their loyalty for him, rather than justice.

The dominant rule of the executive authority over the judiciary, leads the institution to act in accordance with the guidelines drawn by the executive authority. It leads to establish the judiciary as a subsidiary of the executive, rather than an independent form. The judiciary in the Russian Federation does not act independently, since independence is not part of the culture. There have been no movements inside the Russian judiciary fighting for independence from the executive. The lack of independence surely leads to the clear absence of collective accountability of judicial authority.

Judges in the Russian Federation do not violate the guidelines set for them by the government, which dominates them, as well as the legislative body. Judges within the institution are not accountable, either to the public, or to the legislative authorities, due to the lack of separation of power. The rules related to their individual accountability are quite elusive and vague.⁸²⁶ In the US, the president is the authority in charge of nominating judges of the US Supreme Court, as well as federal judges. However, the president does not have any authority over the impeachment of justices. In the Russian case, the

⁸¹⁸ *Id* at 1027

⁸¹⁹ *Id* at 1027

⁸²⁰ *Id* at 1027

⁸²¹ *Id* at 1027

⁸²² *Id* at 1028

⁸²³ *Id* at 1028

⁸²⁴ *Id* at 1028

⁸²⁵ LAW ON THE STATUS OF JUDGES § 12/1

⁸²⁶ *Id* at 1030

president nominates the justices, as well as chairpersons of the courts. Instead of delegating the power of impeachment to the legislative body (in the US), or in to an independent institution (in France), it hands the authority of the impeachment of judges to other judges appointed by the executive authority. Thus, it is rather difficult to write about rules of independence, and accountability in the Russian Federation.

IV. Reform to judicial accountability:

A. The Current Dilemma of Judicial Accountability and Political Participation

1. Prohibition of from political participation of judges

Professor Rifaat Fodah, the Chair of Public Law Department at Cairo University argues that every division of authority in the state, has the right to participate in politics. He maintains that the only exception from this rule is the judicial authority.⁸²⁷ However, this is not the rule except in Egypt. Judges in the United States are able to express their political opinion. Their free expression is not only reflected in their personal life, but also in their judgments. In the United Kingdom, courts can make statements to the public about certain cases of public interest.

Prohibition of participation of Egyptian judges in political participation is based on two reasons. Firstly, the fear that the judiciary unwittingly exposes practices of the executive authority, thus undermining their popularity. For instance, the judiciary has played a great role in exposing fraudulence of the elections of 2005. Secondly, article 73 of the Judicial Authority law states “Courts are prohibited from expressing political views, and judges are equally prohibited from working in the political arena. They are prohibited from standing for elections for peoples’ assembly, regional institutions, or political organizations, unless they give up their calling in the judiciary.” Besides, article 72 of the Judicial Authority Law states “judges are prohibited from being part of commercial transactions, or participating in any work that does not comply with principles of judiciary independence.”

2. Ambivalence towards the prohibition of political participation policy

The current situation leads to arbitrary action. The law prohibits judges from participation in politics, as a general rule.⁸²⁸ In fact, this is not the case. There are two exceptions to this rule. The first is right wing judges, who have made clear statements to the media against the Muslim Brotherhood and their politics, in both houses and the executive body. The leader of this faction is Chancellor Ahmed al-Zend.⁸²⁹ The second exception is left wing judges, who always asked for judicial independence, and played a vital role in defaming the fraud election of 2005. After the 25th of January Revolution, many of them took high profile state positions. The Ministry of Justice and the vice president of the country were members of this wing, including the Mikky brothers (Chancellors Mahmoud and Mohamed Mikky). After the Military coup in 2013, some of the members of this wing signed a document to condemn the coup.⁸³⁰ They have also publicized this document in Rabaa al-Adawiya Square, the center of the sit-in of the Muslim Brotherhood following the Coup. This group of judges was later called “the Judges of Rabaa.”

⁸²⁷ Rafeet Fodah, al-Tashre’at al-Dostorayah le-soltah al-qadaayah we-wad’ Ossos Tahkik al-‘dalah we-bana dawlat al-qanwana, (2012) <http://hccourt.gov.eg/Pages/elmglaacourt/mkal/23/rafat%20foda.htm>

⁸²⁸ JAL (1972), §73

⁸²⁹ Later paragraphs will highlight his statements and interviews, both public and private interviews, about policies of the Muslim Brotherhood

⁸³⁰ More than 55 judges were impeached for writing condemning statement of the Military Coup. *See*, Egypt; arbitrary and unfair removal of judges must be reversed, International Commission of Jurists {Marsh 28th, 2016}, <http://www.icj.org/egypt-arbitrary-and-unfair-removal-of-judges-must-be-reversed/>

Ambivalence towards this situation has resulted into a clear fact. Judges of *Raba'a* are now prosecuted in front of the disciplinary commission for violating article 73 of the judicial authority law. The document that they have signed empathizing with the Muslim Brotherhood members, is considered political participation. Hence, their act is a violation of the judicial law. Judges of the left wing do not face any charges for violating the same article, despite their clear statements in the media, and public. The current JID policy considers the first case as protection to judicial independence from the brutal aggression of the executive. The JID would consider that actions in the second case are violation to the article 73 of the law.

3. The Constitutional Declaration of 2012

Before the Constitutional Declaration of 2012, the relationship between the Judiciary from one side, and the executive and legislative bodies on another was dominated by the Muslim Brotherhood, was tense and apprehensive. Certain judges have issued some statements against the executive and the legislative bodies. Vis-à-vis, the executive body, and members of the legislative authority have made counter statements against the judiciary. On the other hand, all these scuffles were limited, but not organized, until the proclamation of the 2012 Constitution. At that point, many judges took to strike, resulting in two stages: post Constitutional Declaration, and pre-Constitutional Declaration.

There is also another question of why this period is of significance to the issue of accountability. This period has witnessed a clear and direct change to the policy of the judiciary, of complete isolation from politics. This declaration has two important aspects from the viewpoint of the judiciary, at the time of its release. Firstly, it reopened the investigation and prosecutions in acts committed against the revolutionaries.⁸³¹ If the regime wishes to take serious action against such crimes, it is supposed to take to major steps. Firstly, it should be a signatory in the International Convention of the International Criminal Court. This step will bridge the gap in the national criminal law in relation to the definition of crimes against humanity. Secondly, the regime should establish special, competent tribunals able to handle such crimes. Such tribunals will have all the protection and the guarantees to achieve its goal. Instead, the executive authority takes this step in order to protect itself against the judiciary that was in the process of dissolving the parliament at that time.

Secondly, this declaration has granted immunity to the constitutional declaration issued by the President, against any form of judicial supervision. This immunity was not limited to a certain period. The start date was defined, while the end date was left open-ended. The President has linked the conclusion of immunity, to the endorsement of the new Constitution.⁸³² Taking place in December of the same year, means that it took six months to suspend the declaration. The third point is limiting the years of service of the Attorney General to only four years.⁸³³ Previously, the period of holding office for the Attorney General was indefinite, as long as he is still in service. After the declaration of the current constitution, the term of service has either been limited to 3 years, or until reaching the age of retirement, whichever is fewer years.

B. The proposed agency to handle JID, instead of the Ministry of Justice:

1. SJC and the JID Supreme Judicial Council

The current proposed amendment of JID is the transfer from the Ministry of Justice, to that of the supreme judicial council.⁸³⁴ There are arguably two merits of such relocation of power. Firstly, it

⁸³¹ EGYPT CONST. DECLARATION (2012) §1

⁸³² EGYPT CONST. DECLARATION (2012) §2

⁸³³ EGYPT CONST. DECLARATION (2012) §3

⁸³⁴ MOHMUD AL-KHUDAYRI, THE LAW ON JUDICIAL AUTHORITY AND JUDICIAL INDEPENDENCE, {Nathalie Bernard-Maugiron ed. Judges and political reform in Egypt} 47-48

transfers JID from the executive authority, to the judicial authority. However, such advantage is not tangible. All the ministers of justice are former justices. There is no concept of multi-party system in Egyptian government and especially the Ministry of Justice.

Judges never accept having a Minister of Justice from of the administrative judiciary. In July 2013, the president has made an attempt to appoint Judge Mohamed Mahdi, a judge at Egyptian State Council and ICTY. It was rejected by most of the administrative judges. A member of the judges' stated "the club, as well as the judges, will boycott the ministry if Judge Mahdi was chosen to be the minister."⁸³⁵ The president was then forced to appoint him as the Minister of Transitional Justice.⁸³⁶ Besides, all members of the JID are judges, who are on secondment to the department. There is a customary practice that forbids any secondment in the Ministry of Justice to non-judges, or to lawyers.

There are allegations that the Ministry of Justice uses the inspection department to retaliate against undesirable judges.⁸³⁷ However, there is no deference of such a transfer of power, since it will make the Supreme Judicial Council the judge, and opponent at the same time. The role of the JID in the Ministry of Justice is limited to investigating violations committed by judges, and prosecutes cases in front of the impeachment committee. The committee is the only authority that has the right to impeach a judge. The committee consists of seven members, six of whom are members of the Supreme Judicial Council.⁸³⁸ Hence, the authority of impeaching a judge is in the hands of the Supreme Judicial Council.

Some disadvantages indicate that the formulation of the impeachment committee is undemocratic. The committee does not face the dilemma of legitimacy, since the people, nor the judges neither chose it. There are additionally many allegations of unfairness. In an unprecedented act from the chair of the committee, who is also the president of the Supreme Judicial Council, he jailed Judge Amir Awad. Judge Awad has allegedly opposed the committee's intentional postponement of the "Judges for Egypt" case.⁸³⁹ When members of the 'judges for Egypt' requested him to step down from the impeachment committee, he adamantly refused their request. He was being the plaintiff, and the judge in the same case.⁸⁴⁰

2. Independent Judicial Inspection and the Impeachment Committee

From comparison between the various countries and Egypt, the proposed form of impeaching a judge shall falls in the hand of an independent committee. There are three merits for adopting independent judicial inspection, and an impeachment committee. Firstly, it indicates a democratic choice of the impeachment committee members. Secondly, the formulation of the impeachment committee consists of senior judges, who are already members of the committee, as well as elected judges, who represent

⁸³⁵ *Al qodah yad'own ljam'yah ghair 'adayah 'tradan 'la almahdi waziran lel'dl*, moheet.com, {16 July 2013}, <http://www.moheet.com/2013/07/16/1797290/%D8%A7%D9%84%D9%82%D8%B6%D8%A7%D8%A9-%D9%8A%D8%AF%D8%B9%D9%88%D9%86-%D9%84%D8%AC%D9%85%D8%B9%D9%8A%D8%A9-%D8%B9%D9%85%D9%88%D9%85%D9%8A%D8%A9-%D8%BA%D9%8A%D8%B1-%D8%B9%D8%A7%D8%AF%D9%8A%EF%BF%BD.html#.Vu5dsxKk1g>

⁸³⁶ Ahmed Morsy, *Transition Justice: Egypt's Way Forward*, Middle East Institute, {July 26, 2013}, <http://www.mei.edu/content/transitional-justice-egypts-way-forward>, see also, Who's Who: Egypt's full interim cabinet, ahram online, {July 17, 2013}, <http://english.ahram.org.eg/NewsContentPrint/1/0/76609/Egypt/0/Whos-who-Egyptys-full-interim-Cabinet.aspx>

⁸³⁷ Interview with the chair – and the vice Minister of Justice during the Muslim brotherhood period- he states that the Ministry of Justice used – in the past- the department to retaliate from judges. To read this interview, <http://www.soutalmalaien.com/products15.php?id=498#.Vu5gMxKk1g>

⁸³⁸ § 98 of JAL.

⁸³⁹ Dina Ashour, *Habs qadi albayan raba'a*, Vetogate {February 23, 2016}, <http://www.vetogate.com/mobile/2059727>

⁸⁴⁰ In his tweet, Judge Hossam Mikkawi – one of judges for Egypt group – states that they are trying to revenge from us for defending the legitimacy of the ex-president Mohamed Morsi.

the conscience of the judiciary beyond any bias. It moreover consists of senior law professors, who have made significant contribution to the judicial field. New members can be added from the general public. This stage is not foreseen in the near future since the system of the jury system (composed of members of the public) is not yet recognized in the Egyptian judiciary.

Thirdly, the formulation of JID shall be transferred to the Supreme Judicial Council. It is conditional on the adoption of a new council that elects its members from the judiciary. As mentioned earlier, there is no difference between them, even though the Ministry of Justice scores better than the Supreme Judicial Council in its current form. Judges can still pose resistance to the Ministry of Justice, but they will not be able to resist the inconsistency of the decisions of the SJC, hence a need for a new formulation.

V. Conclusion

The full transfer of power from the executive to judicial accountability will take time to actualize. This chapter calls for public participation in the judicial process, especially that of impeachment of judges and prosecutors. Developed countries have progressed at a much faster pace than that of Egypt. Such comparison clarified the gap in the role of judicial accountability. Accountability was created to fight corruption and arbitrariness. It seeks integrity to a third branch of the government.⁸⁴¹ Some scholars argue that judicial accountability faces interruption and delay. Their argument is based on the concept of “justice delayed, justice denied.”⁸⁴²

⁸⁴¹ *Id* 881

⁸⁴² Ziyad Motala, *Judicial accountability and court performance standards: Managing Court Delay*, 34 *Comp. & Int'l L.J. S. Afr.* 172 (2001) 172, *See Also*, David Steelman, *What have we learned about court delay: Local legal culture and case flow management since the late 1970's?* 19 *J. Sys. J.* 145 (1997), 145.

Chapter Five:
The Reform of Judicial Appointment:
Judicial Appointment Authority versus Judicial Appointment Qualification

Outline

- I. Introduction:
- II. Judicial Appointment in Egypt
 - A. Qualifications for Judicial Appointment
 - 1. Appointment of Judges
 - 2. Qualifications of Prosecutors
 - B. The Authority of Appointment
 - C. The Current Challenges in the judicial appointment in Egypt
 - 1. The Role of the Executive Authority
 - 2. Entrance Requirements
 - 3. Exclusion Based on Class Distinction
 - 4. The Appointment of Women
- III. Judicial appointment and Education Applications in a comparative context:
 - A. Judicial appointment in Common Law Countries
 - B. Judicial Appointment in Civil Law Countries
- IV. Proposed reform for the Egyptian judiciary
- V. Conclusion

I. Introduction:

Judicial appointment is a debatable issue, involving several legal, political and social aspects.⁸⁴³ These aspects are related to the legitimacy, and the qualification of the judges, where judicial legitimacy is a core principle. “In the name of the People” or “In the name of the King” has always been the two main sources of legitimacy, the “King” being a person or an institution. Judicial qualifications are major issue, when it comes to holding a position in the judiciary hierarchy. Is a law school degree sufficient for judicial appointment? Or should the judge have more post graduate education to support his role? As this chapter argues, there is no ideal answer to this question, it is a balance between judicial appointment qualifications, and the relevant appointment authority.

This chapter tackles the legal debate surrounding judicial appointment in a comparative law context. It is divided into three main parts. The first discusses the current status, and contemporary challenges in the judicial appointment in Egypt. It highlights the conflict between the *de jure* and *de facto* in the judicial practice. The second part presents judicial appointment practice in various countries. It compares civil law, common law, and post-socialist country practices. The aim of this comparison is to find a solution for the judicial appointment, and related wrongful practices. The third part of the chapter presents the solution for problems identified in the first part of the research.

II. Judicial Appointment in Egypt

A. Qualifications for Judicial Appointment

1. Appointment of Judges

Judicial appointment requirements are very few, compared to that of developed countries. The two major pillars of judicial appointment are judicial qualifications, and judicial authority. Judicial qualifications consist of judicial education, prior and post judicial appointment training, as well as judicial appointment assessment. As for the judicial authority, there is a debate on the number of governmental divisions that have the right to appoint, in addition to whether the appointment should be through elections.

As for educational requirements, Article 38 of the JAL mandates only one educational requirement, a Bachelor of Laws. It indicates the general rules of judicial candidates to be: 1) an Egyptian national, 2) not less than 30 years old, 3) holding a Bachelor of Laws from a law school in Egypt, or a foreign comparable degree, 4) does not have criminal or disciplinary records, even if the candidate is during any criminal rehabilitation process, and 5) be of good standing and reputation.⁸⁴⁴

In this regard, judicial requirements in Egypt are similar to those of the United States and the United Kingdom. However, they are no match to those of France and Germany, which are civil law countries like Egypt. The Egyptian system of judicial education was influenced by the British system of appointment. Article 38 was retained from the JAL during the monarchy system, where the authority of the judge is based on the authority of the King rather than the people. The king had absolute authority over the choice of judges. Hence the likelihood of appointing judges who lacked superior qualifications, but whose major strength was their loyalty to the king.⁸⁴⁵

In theory, Article 39 categorizes those who claim the right for appointment in the judicial authority. Potential candidates should 1) have previous work experience as judges, or worked in a similar position

⁸⁴³ Peter Webster, *Selection and Retention of Judges: Is there one “Best” Method?* 23 FLA. ST. U. L. REV. 1 (1995-1996), 3-5.

⁸⁴⁴ § 38 JAL

⁸⁴⁵ John Dodd, Christopher Murry, Stephen Preser, Mark Pulliam, Alfred Putnam, Paula Stannard, *The Case for Judicial Appointment*, The Federalist Society for Law and Public Policy Studies, (2003) <http://www.fed-soc.org/publications/detail/the-case-for-judicial-appointments>

according to the law, 2) be senior public prosecutors, 3) be public prosecutors who worked for four years, 4) be junior judges at the state council, junior lawyers at the state litigation authority, or senior administrative prosecutors, 5) be lawyers eligible to work at the court of appeal for at least four years, and have nine years working experience, and 6) be law professors who held their position for at least nine years in such position.⁸⁴⁶

Practice is widely different from the theoretical statement of the previous article. Judicial appointment is only limited to “senior public prosecutors” who are 30 years old. The gap between text and practice goes back to the authority of appointment, which is the Supreme Judicial Council (SJC). Call for appointments is issued on yearly basis; however, it is neither announced to the public, nor to those who fall outside the previous category. There are no additional educational requirements for the appointment of a judge, except for being a prosecutor. This system is based on Article 49 that states “the selection of court judges of first instance of class (B) [is] by way of promotion from members of the prosecution on the basis of their seniority, work and inspection reports.”⁸⁴⁷

Concerning the requirement for formal training prior to appointment, in theory, being appointed, as a judge does not require any additional training. Unlike France and Germany, there is a requirement of judicial training prior to appointment. In France, candidates have to spend a two-year training period in a judicial training center. In Germany, candidates have to pass two assessment tests besides their core education. Both the Ministry of Justice and the Supreme Judicial Council offer obligatory training courses to prospective candidates.

It may be argued that judges are appointed from a pool of prosecutors, who have at least 5 years of working experience. However, these candidates are only trained in the criminal law and procedures field. All the prosecutors in Egypt lack necessary training in other fields, such as civil law, general commercial law, and labor law. The JAL is, theoretically, formulated to achieve a required balance in the appointment procedure. It offers equal opportunity to other candidates including law professors, administrative prosecutors, and lawyers, to fill the gap in other branches of law.

In practice, the Supreme Judicial Council does not open the way for other categories. It has not, at least in the past 20 years, appointed a candidate from the prosecutors’ category, except one. The Council has never issued a clear decree of prohibition of appointment against the other categories; it is rather a form of “covert consensus”. Notwithstanding Article 47, and the legal right to a quota in the appointment share, there is no publicized call for appointment for those outside the previous category.

For the appointment of judges in primary courts, the number of lawyers in each call for appointment is not less than a quarter of the appointees. For the appointment of judges in the court of appeal, the number of lawyers is not less than a tenth of the total number of appointees. Many lawyers have filed complaints against the Council for such an adverse decision, which have been later denied.⁸⁴⁸ One of the reasons of rejection is that complaints have been filed to the administrative court, which has no jurisdiction over such a controversy. Besides, the only circuit with jurisdiction is the “judicial members’ circuit.” Even though these kinds of complaints should be directed exclusively to this circuit, it only deals with cases filled from judges or prosecutors. A judge, not a lawyer, is the one authorized to handle the lawsuit, and this type of cases. The lawsuit will be denied, because of the lack of party

⁸⁴⁶ § 39 JAL

⁸⁴⁷ § 49 JAL

⁸⁴⁸ Case to suspend the negative decision of not appointing lawyers in the public prosecution bureau, EGYNews.net, (January 19,2015) <http://www.egynews.net>, *See also*, Judgment in the lawyers cases, Dostor newspaper, February 17, 2014, <http://www.dostor.org/198870>

interest. The judge will be asked in court about his/her interest in handling the case. Hence, the case will be dismissed at any level.⁸⁴⁹

As for post-appointment training, the Supreme Judicial Council offers training for first-time appointees. The entire pool of candidates has to take a one-month fulltime training during their last summer at the prosecution bureau. Training is conducted on various types of law, and is not focused on the substantive law; rather on the method of approach to cases.⁸⁵⁰

The National Judicial Studies Center (NJSC), established in 1981, is the principle institute in charge of offering specialized training to judges throughout their professional careers. The board is chaired by the ministry of justice, and consists of the attorney general, four judges, the director of the center, and four experts appointed by the Minister of Justice.⁸⁵¹

The NJSC falls under the supervision of the Ministry of Justice, including its president and its findings. The Minister of Justice is the competent authority of appointing the director of the center, after the approval of the Supreme Judicial Council.⁸⁵² The NJSC offers training courses to junior and senior judges. However, these courses are not mandatory, except in the case of candidates joining the judiciary. The other types of training are largely unregulated and depend mainly on funding by the Ministry of Justice to the Center. The selection of judges taking part in training courses, is based entirely on the recommendation of the president of the primary court, which is to a great extent based on personal preference.⁸⁵³

2. Qualifications of Prosecutors

Judicial appointment requirements, the SJC, and the Ministry of Justice – have a long history of selecting prosecutors, who are 30 years of age, and have at least 5 years of working experience, to work as judges in primary courts. As for the court of appeal, the only way to appoint judges is by way of seniority: judges must be at least 43 years old, and have at least 10 years working experience in the lower courts. Article 116 states that the general rules for appointing a judge, apply to the appointment of aide to district attorney, the junior most rank in public prosecution. Besides, the article has an age requirement for the aide, which is 19 years.

As for assistant public prosecutor, the candidate should be at least 21 years, and is required to pass a test.⁸⁵⁴ JAL does not specify any regulations concerning such a test, whether written or oral, the passing grade, and the material the candidate will be examined on. Throughout my working experience, I have not heard of a general test new prosecutors have to take, except for the oral exam and interview with the members of the Supreme Judicial Council. It is rather an informal discourse with candidates that is concluded by a legal question.

⁸⁴⁹ § 83 JAL states that ‘Civil circuit court of appeals in Cairo, headed by the Chief of this court, and not others, to decide cases brought by the judiciary and public prosecutors to cancel the final administrative decisions relating to any affair of their own affairs. And specializes in these circles, but not others, the determination of compensation for those making claims. It also specializes in, but not others, to decide cases for salaries, pensions and bonuses owed to the judiciary and public prosecutors or their heirs. May not be seated for the adjudication of these cases than had previously been involved in the decision, which filed the case because of it. And be challenged in verdicts in cases provided for in the preceding paragraphs, before the departments of civil and commercial matters the Court of Cassation, but not others, within sixty days from the date of the judgment.’

⁸⁵⁰ New Judges training, National Judicial Studies Center, (2014)

<http://www.jp.gov.eg/project/Default.aspx?proj=6qDVSeW2mi5YG%2bPVbz4mBg%3d%3d&&pagid=2pAKJqx%2f329BG2DzKDWMeQ%3d%3d>

⁸⁵¹ § 3 NJSC {1981}, Egypt

⁸⁵² § 4 NJSC {1981}, Egypt

⁸⁵³ There is no formal citation to such behavior; I will need to make a questionnaire to prove my claim.

⁸⁵⁴ § 38 JAL

As for judicial education for prosecutors, there is no required formal training prior to their appointment. Unlike the US and Germany, the judicial system is set up to offer judicial externships to law students, despite financial problems, and shortage in the number of judges recruited. In Egypt, judicial externship/internship is neither recognized at law schools, nor in the judiciary. Hence, there is a lack of a recognized formal training before joining the judiciary. The only way to acquire expertise is through recruitment at private law firms. Such a process of acquiring practical experience during school years is nonetheless hard. Law students are not authorized to present in courts, even under the supervision of an attorney. This system is still not a recognized in Egypt.⁸⁵⁵

Successive administrations of the prosecution bureau believe in the dictum “the best way to learn how to fight, is to have one.” New prosecutors start their careers without further academic training until the end of the first two years of their appointment. During which time, each aide to district attorney, and assistant public prosecutor, are assigned to the supervision and mentoring of a senior public prosecutor.⁸⁵⁶

The role of NCJS starts with the end of the first two years of appointment. Junior prosecutors, who have had adequate practice during this period, spend an additional period of 1 to 3 months training at the Center. Job tasks of the new prosecutors become much easier, with the combination of increased professional and educational experiences. Training is a major help in the correction of various common mistakes that they have committed during their first two years of practical experience.⁸⁵⁷

Finally, all candidates are required to pass a mandatory medical check, before decisions are made and announced in national newspapers. The main aim is to ensure that appointees are alcohol and substance-free. Even though there is no formal requirement in the JAL in this regard, this requirement is imposed by the Supreme Judicial Council. Appointees also generally accept the practice. Those who fail the tests are instantly removed from the candidacy list.⁸⁵⁸

B. The Authority of Appointment

Article 44 of the JAL authorizes such appointment to the President of the Republic, after the approval of the SJC.⁸⁵⁹ The SJC selects those who meet the minimum requirements, requirements. After the SJC issues the call for application in two of the widely distributed national newspapers. It sets a date of interviews for law school graduates, who obtained a general grade of “Good”.⁸⁶⁰ This interview is the means to deliberate the candidates’ legal ability. Each candidate is asked three legal questions by each member of the SJC committee, one of which the candidate has to correctly address.

⁸⁵⁵ Practical Training of law student PTLs, The State Bar of California, (2015), <http://admissions.calbar.ca.gov/Education/LegalEducation/PracticalTrainingofLawStudentsProgram.aspx>

⁸⁵⁶ § 795 Judicial Instruction Manual for Prosecutors

⁸⁵⁷ Supra note 850

⁸⁵⁸ There is not any formal citation to such results. The Supreme Judicial Council never prevails such information. It practice maintains to eliminate candidates without having any legal actions against their addiction. On the other hand, such information is well knew in both judicial and lawyers societies.

⁸⁵⁹ § 44 JAL, it states that “the appointment of judicial positions, either through appointment or promotion, is a matter of decision of the President of the Republic ... after taking consulting with the Supreme Judicial Council.” The article further stipulates that “the appointment of the heads of the courts of appeal, and the deputies and consultant, presidents of primary courts, judges is finalized after the approval of the Supreme Judicial Council.”

⁸⁶⁰ § 116 JAL, in 2011, the total number of candidates scoring ‘good’ was 4000, of which only 400 were selected to work as aide to district attorney. Moreover, the application process for appointments is open at the end of the fourth year of law school. This process is limited to graduates of each year; graduates of previous years are not eligible to apply. There is no legal rule to prevent such a practice. However, the Judicial Supreme Council tends to limit the scope of applications and those who are eligible to apply. This is shown in the advertisement in the figure below, which is limited to graduates of the 2012 school year only.

At the conclusion of the interview stage period, the SJC does not reveal grades given to candidates. They get to know their results in a year's time from the date of the interview. The SJC sends the name of successful candidates to the Ministry of Justice for criminal record, and security check up to the fourth grade of kinship. After this stage, names are sent to the President of the Republic to issue the appointment decree. As a general practice, the President does not change the final list of candidates.⁸⁶¹

Out of the general five requirements for each candidate, there are two related to security issues. The first is that the candidate should not have any criminal or disciplinary record, even if the candidate is going through any criminal rehabilitating process.⁸⁶² The second requirement is that the candidate should be of good standing and reputation.⁸⁶³ If the candidate's record is cleared, it goes to the following step of checking the family's criminal record.⁸⁶⁴

Concerning the family of the candidate, JAL does not enclose any article related to family security check. However, in practice, candidates are required to fill in a family-tree form. The form includes names, addresses, kinship, and employment of the various family members, up to the fourth grade. This includes parents, grandparents, siblings, uncles, and cousins as well as their spouses. Besides, both the candidate and his parent (father) are required to issue finger print certificates to check their criminal records. In case there is a crime committed by one of the candidate's family, up till the fourth level, the Council will immediately eliminate the candidate from the pool of appointees.⁸⁶⁵

Legally, there is no direct foundation for candidates to be checked by the agency of national security. However, the practice is based on two factors. Firstly, the general rule is that candidates cannot have any criminal record. Secondly, Even though political orientation is not a crime, there is a tendency to eliminate candidates based on their political affiliation. Belonging to conservative Muslim political groups has always been a hurdle against joining the judiciary. Article 73 of the JAL prohibits participation in any political activity: "courts are prohibited to express any political view, also judges are prohibited from engaging in any political action and may not be elected to the People's Assembly or regional bodies or political organization only after submitting their resignations."⁸⁶⁶

Even with the absence of legal ground, this is the practice of the SJC. The Ministry of Justice is the only competent authority in coordinating between the SJC and the agency of national security. This step is neither publicized; nor disclosed by the SJC to the candidates. However, if any candidate chooses to oppose such a step (up to fourth degree relatives), he is instantly eliminated from the candidates' list.⁸⁶⁷

C. The Current Challenges in the Judicial Appointment in Egypt

1. The Role of the Executive Authority

The role of the executive in the appointment process takes several shapes. Firstly, the JAL gives the president the ultimate authority to issue the decree of appointment of judges, and aides to public prosecutors. However, the president of the republic delegates the Minister of Justice to handle such a

⁸⁶¹ Nevertheless, there are many allegations that there are some names has been added or removed during the signature period

⁸⁶² § 38 JAL

⁸⁶³ § 38 JAL

⁸⁶⁴ Inheritance of judicial posts crisis, Interview with President of Supreme Judicial Council (2012) (in Arabic)

<http://www.daralhilal.com.eg/print.php?id=730>

⁸⁶⁵ *Id*

⁸⁶⁶ § 73 JAL

⁸⁶⁷ This information is required in the application for the aide to the district attorney. The application asks much information about candidate and his family's history. It also requires any stating any travel or relation with international organization.

process, where he eventually signs the decree. Even though there is no official role of the Minister of Justice in the appointment process, he plays a vital role as a veto power over any appointment.⁸⁶⁸

Before joining the public prosecution bureau, candidates do not meet the Minister of Justice, while they meet with the head of SJC only once. However, after their appointment, candidates take their vows of appointment in front of the minister and the attorney general. The oath reads: “I swear by almighty God to judge among people with justice and respect the laws.” Article 71 mandates that the President of the Court of Cassation takes oath before the President. While the president of the court of cassation takes oath in front of the President of the country, and aides to district attorneys take oath in front of the Minister of Justice. Prosecutors, who are later transferred to the bench, do not have to re-take the oath.

Secondly, security agencies play a vital role in finalizing the choice of candidates. This role is more targeted to eliminate unfit candidates, rather than choose eligible ones. The security process is made up of two stages, both influencing on the decision of SJC. The work of security officers, who handle security files of candidates, is often marked by ambiguity and lack of transparency. It is more widely acknowledged that police performance is corrupt and non-transparent.⁸⁶⁹ It is increasingly hard to depend on the partiality and transparency of eligibility of candidates, and the reports they produce.⁸⁷⁰ Moreover, candidates neither have access to their security files, nor are able to appeal their security status in case of exclusion from the pool of candidates. Such reports are surrounded with a great deal of confidentiality and clandestineness. There was never a comprehensible reason why these reports are handled in such manner, in regards to both general and national security checks.

JAL did not specify the exact type of crimes that tarnish the candidate’s history. Article 38 states “candidates should have no criminal records, and has a good reputation”. However, the connotation of ‘good and bad’ reputations is left to the discretion of the SJC. As for the political history of the candidate, the SJC has a zero-tolerance policy in this regard. This approach has eliminated many candidates, especially those who have affiliation with the Muslim Brotherhood.⁸⁷¹ Before the 25th of January 2011 Revolution, such exclusion existed without any justification, it was an automatic process.

There are two aspects to extending the security requirements to family members of the candidates. These aspects are the legal basis for this requirement, and the meaning of policies in a socialist, post-socialist country. Firstly, there is no legal basis for such a practice. The only legal basis found in Article 38, stipulates checking the criminal record of the appointees. The law does not mention any financial, educational, social, or behavioral norms for the family. However, the Supreme Judicial Council takes into consideration all these accounts, while making the final appointment decision.⁸⁷² As for the political background, it only finds its basis in the article that prohibits members against political affiliation. This article is concerned with current members of the judiciary, not with prospective candidates.

Even though JAL does not include any article requesting information on family members, this kind of data is required in the application in a separate appendix.⁸⁷³ Additionally, members of the judiciary as

⁸⁶⁸ § 44 JAL

⁸⁶⁹ Mohamed Arafa, *Towards a culture for Accountability: A new Dawn for Egypt*, 5 PHOENIX L. REV. 1 2011-2012, 9,

⁸⁷⁰ The corruption of the police forces is a general trend of the contemporary Egypt, See Emad El Din Shahin, *Brutality, torture, rape: Egypt’s crisis will continue until military rule is dismantled*, <http://www.theguardian.com/commentisfree/2014/mar/06/brutality-torture-rape-egypt-military-rule>

⁸⁷¹ Exclusion of the Muslim brotherhood from the public prosecution appointment, Veto (2013) Arabic website, <http://www.vetogate.com/447110>

⁸⁷² *Supra Note 864*

⁸⁷³ Appendix 3 of the public prosecution bureau appointment application contains chats of the application family members. Each candidate has to fill this appendix at the best of his knowledge. It is also important to know that such appendix also

well as the SJC have always defended such a practice.⁸⁷⁴ They argue that not being affiliated with any political group ensures the prosecutor's partiality.

The double standard of the ban of political participation is only limited to Islamist political affliction. The absence of real political parties in Egypt before the 2011 Revolution leads to the fact that Muslim Brotherhood (MB) was the only serious political competitor against the NDP. NDP affiliated officials used to ban the MB before January 2011, and after July 2013.⁸⁷⁵ If there was any real political membership in the country, it would either be the NDP (*Flowl*), or the Muslim Brotherhood (*Islamist*). While having a family affiliation with the NDP would never prevent the candidate from joining the bench, any affiliation to the MB would be considered as political affiliation, and will result in instant exclusion from candidacy.⁸⁷⁶

Additionally, the meaning of politics in a socialist and post-socialist country is always vague. It depends on an ideology that bans coexistence of other ideologies.⁸⁷⁷ During the socialist era, there was always one political party, the Arab Socialist Union established in 1962, and later the National Democratic Party (NDP) in 1978. These were the real dominant parties that no other political party dared to stand against. The NDP used to win the majority of seats in both Houses. In 1995, it won 415 seats out of 520.⁸⁷⁸ In 2000, it won 388.⁸⁷⁹ In 2005, it won 311 seats.⁸⁸⁰ In the last elections in 2010 before it was dissolved, the NDP won in 2010 a total of 473 seats.⁸⁸¹

2. Entrance Requirement

JAL does not stipulate any entrance test requirements except in the case of appointing assistant public prosecutors. Article 116 states "no one can be appointed in the position of assistant public prosecutor, except the aide of district attorney, unless the candidate passes a comprehensive exam." The Minister of Justice, after consulting with the Supreme Judicial Council, issues the rules, terms, and conditions of the exam. Besides, candidates have to be members of the Bar Association with good standing, or possess at least two years of working experience.⁸⁸² Since 2006, no one has been appointed directly to be assistant public prosecutor. The Supreme Judicial Council never discloses the reason why this mode of employment has ceased to be used.

As the article states, since the exam is oral, is it not considered comprehensive. In the French and German systems of appointment, the exam is written. Other times, especially in Germany, candidate are required to sit for two comprehensive exams, a system that is not part of the Egyptian appointment system. The lack of a systematic approach to recruitment leads many activists to condemn the Egyptian

exists in the police and army academies. So, they can make sure that no police or army officer would have any political affiliation.

⁸⁷⁴ *Supra Note 864*

⁸⁷⁵ Sharon Otterman, Muslim Brotherhood and Egypt's parliamentary elections, Council on Foreign Relations, (2005) <http://www.cfr.org/egypt/muslim-brotherhood-egypts-parliamentary-elections/p9319>

⁸⁷⁶ Majlas al_Qad'a Yastb'ed 73 'dow be-mahzora men ta'yinat al-nayabah (2013), <http://article.wn.com/view/WNAT974eb3f4eb762745d9deee508ac0bf21/>

⁸⁷⁷ JANOS KORNAI, THE SOCIALIST SYSTEM THE POLITICAL ECONOMY OF COMMUNISM, (Princeton University Press 1992) 48-49

⁸⁷⁸ *Id*

⁸⁷⁹ *Supra Note 881*

⁸⁸⁰ *Id*

⁸⁸¹ Egypt Elections: National Democratic Party, Carnegie Endowment for International Peace, (November 13, 2011)

<http://www.aucegypt.edu/gapp/cairoreview/pages/articleDetails.aspx?aid=122>

⁸⁸² § 116 JAL

system for being based on favoritism in judicial appointment. Many believe that the judiciary has turned into a social, where only sons of members can join.⁸⁸³

Figure (1)

Advertisement of judicial appointment in Public Newspapers⁸⁸⁴



Arab Republic of Egypt
Public Prosecution
Public Prosecution announces
The acceptance of new appointment request in the vacancy
of
Aide to District Attorney
From the graduate class of 2012
Cumulative Overall grade of "Good"

Application can be obtained between
14/12/2013 to 24/12/2013
The application acceptance period is 1/1/2014 to 24/1/2014
Candidate must submit all the required documents
mentioned on the board in the Court of Cassation.
Otherwise, the application will not be accepted.
Application submitted either before or after the deadline
will not be considered

Continuing education of both prosecutors and judges is a somewhat complex issue. The training period following judicial appointment does not follow certain rules, or guidelines, except in two cases. First, it is the training that prosecutors go through at the end of their first two years of work. The second form of training takes place before prosecutors are promoted to become judges.

With the exception of these two cases, mandatory training is not prevalent. The question of continuing education depends mainly on two factors. Firstly is the limitation posed at the National Judicial Center. There are no clear criteria for the selection of members taking part in continuing education programs. This lacking of clear guidelines opens the way to partiality and favoritism by the presidents of courts. Secondly, training is a channel for professional development well sought after. Due to the large pool of applicants, the institute is only able to provide support in the form of educational, unpaid leave. The educational leave can be extended to a maximum of five years, with the approval of the Supreme Judicial Council, and Ministry of Justice. The approval of the Ministry of Higher Education and the Agency for National Security is also required if study is to take place overseas. If the study is conducted in Egypt, approval is limited only to the Ministry of Justice and the Supreme Judicial Council.⁸⁸⁵

Finally, there is a clear lack of adequate training before joining the judiciary. The lack of post-appointment practical training (judicial clerkship) at law schools is absent for two reasons. Initially, law schools do not coordinate with the ministry of justice, or private law firms to offer legal training for

⁸⁸³ Ahmed Sawi, Apology to Farouk Gwadah, Masry Elyoum, (2006)
<http://today.almasryalyoum.com/article2.aspx?ArticleID=40524>

⁸⁸⁴ The advertisement can be found on public newspapers, printed versions.

⁸⁸⁵ This is the practice of the Supreme Judicial Council and Ministry of Justice toward such requests. JAL does not include rules related to the educational leave. They use the general rule in the Civil Labour law in the state, Even though that such law did not require any security acceptance, it is part of the totalitarian regime requires that action to ensure authority of the security over its national.

their students. There is a lack of intelligible reason for the laidback behavior on the part of law schools, except maybe for a heritage of centralized decisions of educational policies in Egypt.⁸⁸⁶ There are two institutions that govern the totality of the educational structure in Egypt. The Ministry of Education supervises “all post-secondary education, planning, policy formulation, and quality control activities.”⁸⁸⁷ The second entity is the Supreme Council of Universities. It is set to formulate “the overall policy of university education and scientific research in universities, and determines the number of students to be admitted to each university, each year.”⁸⁸⁸ Usually, these two entities never coordinate with the Ministry of Justice, or the Supreme Judicial Council to offer legal education to judges. *Vis-à-vis* the Ministry of Justice and the SJC only depend on the NCJS to offer legal education to their members.

3. Exclusion Based on Class Distinction

The first category of candidates that are excluded from the appointment process is candidates with humble means. The history of such exclusion started early, before the Republican era. As mentioned earlier, only the King had the ultimate authority to appoint judges. Article 7 of JAL, issued in 1943, stated that the appointment of judges is done through a decree, a monarchical decree. The 1952 military coup overthrew the monarchy. It has propagated that domination of the upper class in society should come to an end. One of the promises of the revolution was to increase the appointment of less privileged social classes in the army, police, and the judiciary.

For decades, the lower classes have faced great obstacles, and were totally eliminated from the process of judicial appointment. Even if such candidates were high achieving students at their law schools, they would still face challenges to join the judiciary.⁸⁸⁹ In 2011, 138 candidates claim that they were rejected from the appointment process because their parents did not hold a university degree.⁸⁹⁰ A new class has emanated to replace the old upper class. The question of the poor people, who get eliminated from the appointment process, has been presented several times to the Judicial Supreme Council. However, there was never an official statement to explain the reasons behind the exclusion of these candidates. It was never made public, whether the main cause was the lack of financial means, or proper educational background.⁸⁹¹

In May 2015, the Minister of Justice, Chancellor Mahfouz Saber was asked during a television interview whether “the son of a garbage collector stand a chance of being appointed as a public prosecutor”. The Minister of Justice replied “the judge shall be from a proper social class ... with all due respect to the garbage collector and to those who are below or above him ... a proper environment, and a good social class is necessary ... I am not saying it should be the aristocracy ... I am saying the class should not be very low”⁸⁹²

One week later, Chancellor Saber has resigned from his position for making such a statement. Members of a low social class find it difficult to land jobs of the judiciary, or the prosecution. It was

⁸⁸⁶ Mehmet Tosun and Serdar Yilmaz, *Centralization, decentralization and conflict in the Middle and North Africa, Equality and Economic Development* (November 2008)

http://www.erf.org.eg/CMS/uploads/pdf/1223988638_15thAC_INST_Tosun_Yilmaz.pdf

⁸⁸⁷ Higher Education in Egypt, *Egypt Country Profile*, (2004)

http://eacea.ec.europa.eu/tempus/participating_countries/impact/egypt.pdf

⁸⁸⁸ *Id*

⁸⁸⁹ Mahmoud el-masry, *Istba'ad Ta'ynat al-nayabah besabab mo'hel al-waladiyn aw al-faqr*, (2015)

<http://www.albawabhnews.com/275627>

⁸⁹⁰ Lobna Moneib, *Egyptian Law Graduates Denounce class-based job discrimination*, (20 October 2014)

<http://english.ahram.org.eg/News/113461.aspx>

⁸⁹¹ *Supra Note 864*

⁸⁹² albayt baytak – wazear al-‘adl ya yomkan an ya’mal ibn ‘amal anzafah be-qada, YouTube {0:00- -0:38} {may 10, 2015}, <https://www.youtube.com/watch?v=7H8mPdTTJWw>

still hard for the people to accept that members of the government to make this statement explicitly. Even though the appointment process is up to the Minister of Justice as it is mainly the responsibility of the Supreme Judicial Council for ordinary courts and the Special Committee in the State Council, the Minister of Justice was removed from office.

There are two undisputed articles in JAL identifying the quota for lawyers, one for judicial appointment.⁸⁹³ while the second in prosecution appointment.⁸⁹⁴ Article 47 states that the yearly quota should not be less than 25% for the appointment of judges in primary courts, and 10% in the appointment in the court of appeal.⁸⁹⁵ Article 118 states that the quota of lawyers shall not be less than 25% of the total appointees each year in the prosecution bureau.

There is no official position of the Judicial Supreme Council to exclude lawyers' quota from appointment in the judiciary. There was a great fear during the Muslim Brotherhood period that their lawyers will penetrate the judiciary, and abolish judicial independence.⁸⁹⁶ However, the legislative office in *Al Shoura* Council during the MB era stated that there is no objection against the appointment of MB lawyers in the judiciary.⁸⁹⁷ The Council refrained from appointing lawyers for other undeclared reasons.

Moreover, there is an undeclared quota for judges' son and relatives. The president of the Judges' Club Ahmed al-Zend asserted that "appointing children of judges will continue ... there is not a single force in Egypt that can stop such a practice."⁸⁹⁸ The Judges' Club is the only democratic organization within the Egyptian judiciary.⁸⁹⁹ This statement was considered to be the first official statement from an official member in the judiciary. Before al-Zend's statement, there was secret consensus of such a practice, of giving preference to children and relatives of members of the judiciary.

In 2013, more than 114 appointees out of 475 in the prosecution bureau were relatives of members of the judiciary.⁹⁰⁰ An exclusive report has revealed names of candidates, and their kinship to members in the judiciary.⁹⁰¹ In 2014, the percentage increased from 25% to 35%. 168 appointees in the position aide to district attorney out of 485, were related to judges.⁹⁰² The report was published in the local newspaper *Al Shorouk*. The report showed that parents of 87 candidates worked in the court of appeal, parents of 11 candidates worked in the court of cassation, and 55 candidates were judges and prosecutors.⁹⁰³ The report revealed names of appointees, their relatives, as well as their judicial position.⁹⁰⁴

4. The Appointment of Women

⁸⁹³ § 47 JAL

⁸⁹⁴ § 118 JAL

⁸⁹⁵ § 47 JAL

⁸⁹⁶ Ahemd Rabi', Tarek Sabri and Mai Reda, *Tasre'ayat elshoura; La yojad Ma yaman' ta'yeen al-Mohamen al-Akhwan qodah*, Elwatannews (12-01-2013) <http://www.elwatannews.com/news/details/111862>

⁸⁹⁷ *Id*

⁸⁹⁸ Mohamed al-Isamwi, *al-Zend: Ta'yeen abna al-Qodah sayastmeer, we lan tastati' qah fi Misr Iqaf haza elzahf al-moqasas*, Ahram newspaper, (2012) <http://gate.ahram.org.eg/News/182259.aspx>

⁸⁹⁹ El-sayed Gamel el Din, Complaint against Prominent Judge Ahmed El-Zend referred to judicial council, ahramonline, (2014) <http://english.ahram.org.eg/News/96037.aspx>

⁹⁰⁰ Ahmed Sa'd, *Abna al-Qodah yastahowzown ala rob' ta'yanat dof'at al-nayabah al-gedidiah (Shorouk newspaper)*, (7 December 2013) <http://shorouknews.com/news/view.aspx?cdate=07122013&id=32b2ce69-695b-484d-b358-2214a8cdc824>

⁹⁰¹ *Id*

⁹⁰² Ahmed Said, *Bel-asma ... abna al-qodah yastohwazown ala 35% men ta'yanat elnayabah al-gedidiah*, Shorouk newspaper, (17 July 2014) <http://www.shorouknews.com/news/view.aspx?cdate=17072014&id=52446ae9-860f-4183-8c4c-31818a678860>

⁹⁰³ *Id*

⁹⁰⁴ *Id*

From a legal perspective, there was no legal barrier against the appointment of women in the judiciary. Rather it is, what jurists call, a judicial custom based on certain perspectives in Islamic Jurisprudence.⁹⁰⁵ The successive JALs, ever since the monarchy system, did not inhibit the appointment of women as judges. The language of the JAL is very clear in mentioning candidates in a gender-neutral form. Moreover, advertisements of judicial vacancies never state that positions are limited to male candidates.

The issue of appointing women in the judiciary was raised for the first time in 1951. Professor *Aisha Rateb* (1928-2013), who was also the first female ambassador, was the first woman to apply to work as a judge in the State Council.⁹⁰⁶ Her request was denied. She sued the State Council for denying her request, until she reached the Supreme Administrative Court.⁹⁰⁷ *al-Sanhuri*, who is the founder of the modern administrative and civil laws in Egypt, have also denied her appeal. He based his judgment on the fact that such a decision is left for the discretion of the administration in relation to individual cases. He made it clear that there is no barrier for the appointment of women, except for administration grounds. He states:

The limitation of some jobs – like the ordinary judiciary and state council – to men only, and excluding women, is considered to weigh in the occasion of the appointment. The administration enjoys a discretionary authority over determining the suitability of any candidate, according to the nature of a certain appointment. The administration can also base its decision on the customs and surrounding environment. This shall not be interpreted as underestimating the value of women and their dignity. It shall not also underestimate their intellectual, cultural, and educational level. It shall not also prejudice their rights. However, it is the choice of the administration to determine the suitability of certain jobs, per the administration discretionary authority. The administration shall not prejudice the principle of legal equality. The decision of excluding the applicant is sustained as long as there is not any evidence against the administration of misuse of power against the claimant.⁹⁰⁸

Women play a vital role in the administrative public prosecution bureau with a percentage exceeding 25%.⁹⁰⁹ Two women headed the presidency of the bureau in 1978 and 1998. There was obviously an undeclared agreement that women cannot join the ordinary public prosecution; instead they could be placed within the administrative prosecution. This agreement has been in effect for decades. It has been maintained as a sort of compromise from the justice administration, regarding its failure to accommodate women in the ordinary prosecution and the judiciary.

In 2007, a new initiative was released from both the Supreme Judicial Council, and the Ministry of Justice to transfer 31 female judges from administrative prosecution bureau to work in ordinary courts. The argument of Justice and Professor *al-Sanhori*, was directly related to the appointment in the administrative courts. However, women's right to join the ordinary judiciary also has been an emerging debate for a long time. There is no legal rule to prevent women from joining the bench, except the will of the Supreme Judicial Council, and that of the Ministry of Justice. In 2003, Justice *Tahani el-Gebali* was the first woman to get appointed in the Supreme Constitutional Court.⁹¹⁰ In 2007, there was a call

⁹⁰⁵ Monah Omar, *al-Marah fi al-Qada al-Masry: Khotowat Mahdowdah la tasna' rab'an*, Al-Ahram newspaper, 17 August 2013.

⁹⁰⁶ EARL SULLIVAN, *WOMEN IN EGYPTIAN PUBLIC LIFE (CONTEMPORARY ISSUES IN THE MIDDLE EAST)*, (1986), 82

⁹⁰⁷ *Id*

⁹⁰⁸ Supreme Administrative Court, Case No 30 (February 2, 1952)

⁹⁰⁹ *Supra Note 905*

⁹¹⁰ Tahany el-Gebali, *Muslim Women: past and Present, women's Islamic Initiative in Spirituality and Equality*, (2015)

http://www.wisemuslimwomen.org/muslimwomen/bio/tahany_el-gebali/, See also, *Amina Elbendary, Tahani El-Gebali*, Al-Ahram Weekly online, (19 February 2003) <http://weekly.ahram.org.eg/2003/625/profile.htm>

for female candidates to join the bench for the first time. After passing the exam, 31 female justices out of 140 candidates got the job.⁹¹¹

On the other hand, this initiative was the first and the last of its kind. Writes refrained from assessing such an initiative in any way, whether as a success, or a failure. The media has not interviewed any of the justices in question, except *Tahani el-Gebali*. She has made many media statements, which were of political and legal nature, rather than an assessment of the novice experience of her appointment as a justice in the Supreme Constitutional Court. In the 2010 issue regarding the appointment of female judges, she has denied making any statement about the issue.⁹¹²

In 2010, the State Council, which is the Supreme Administrative court in Egypt, announced accepting nomination of female applicants. A decision taken by the board of the State Council, one which triggered major concern and opposition from the public assembly of the court. They called for an urgent meeting to challenge the decision of the board, which was already initiated. Twenty-four female candidates filled the relevant applications of the State Council. Before the closing date and during the submission period, the public assembly of the court had successfully held their session. They nullified the decision of the board to appoint women.

The Public Assembly's decision has led to innumerable debates at that time about reasons and motives behind such a step.⁹¹³ It has instigated many protests from feminist movements in Egypt, many of who have expressed worry about the future of equality in the country. This movement has so far succeeded in imposing its demands. On the other hand, Justice *Adel Farghaly*, member of the public assembly of the State Council, simply summarized the argument about excluding women from judicial appointment. His statement was in line with members of the judiciary. Even though his argument carries no weight, it is worth mentioning due to two important points.

Firstly, he alluded to the mandatory military service for males. He stated "refusal to appoint women to senior judicial positions has always been based on the fact that Egyptian women are not asked to perform military service and offer sacrifice like men. Women occupy judicial functions in western countries because they perform military service, and perform jobs equally with men, including acts of physical labor."⁹¹⁴ In other words, he distinguished between rights and obligations. While men and women enjoy equal rights, he stated that the law has enforced more obligations on men. These obligations include the mandatory military service, and judiciary appointments.

Secondly, he alluded to the suitability of judicial work to women. He stated "judicial work in Egypt is not suitable for women, as they cannot balance their work and personal life duties. They have always been the major care providers for their families, unlike men."⁹¹⁵ This statement represented two issues. Firstly, the administration freely bases its decisions on gender issues. Secondly, financial and social constraints are enough reason for the public administration to deny women's right in judicial appointment.

Currently, there is a constitutional mandate for judicial appointment of women, opening doors for women to join the bench. The current constitution has settled the debate on the discretion of the administration to appoint women in judicial vacancies. Firstly, Article 9 eliminates any form of

⁹¹¹ *Supra Note 905*

⁹¹² *Tahani El-Gebanli*, Lam atahadath hawl ta'yeen al-Marah bel qada, Roza-magazine (24-04/2010)

⁹¹³ Eman Hashim, The Ball in the Egyptian State Council's Court: Female Judges (1 March 2010)

<http://www.patheos.com/blogs/mmw/2010/03/the-ball-in-the-egyptian-state-councils-court-female-judges/>, *See also, Hadeel Al-Shalchi*, Women judges stir up old debate in Egypt, boston.com, (April 6, 2010)

http://www.boston.com/news/world/middleeast/articles/2010/04/06/women_judges_stir_up_old_debate_in_egypt/

⁹¹⁴ *Id*

⁹¹⁵ *Id*

discrimination against women. It states “the state ensures equal opportunity for all citizens without discrimination.”⁹¹⁶ However, this article is not enough to ensure that women will secure positions in the judiciary. The same article existed when *al-Sanhori* stated that it is no prejudice against women in the appointment of certain posts, as long as there is no misuse of discretionary power of the administration. Article 3 of the 1923 Constitution stipulated “Egyptians are equal. They are equal in practicing civil and political rights and duties. Discrimination based on ethnic origin, language, or religion is prohibited.”⁹¹⁷

The general form was not enough. A new solution was proposed and maintained to impose in the 2014 Constitution. Article 11 marks it as an obligation of the administration rather than a discretionary clause. It states explicitly the right of women to secure official judiciary posts. This inhibits any argument by the administration that it cannot accommodate women in certain posts. It states:

The state commits to achieving equality between women and men in all civil, political, economic, social, and cultural rights in accordance with the provisions of this Constitution. The state commits to taking the necessary measures to ensure appropriate representation of women in the houses of parliament, in the manner specified by law. It grants women the right to hold public posts and high management posts in the state, and to appointment in judicial bodies and entities without discrimination. The state commits to the protection of women against all forms of violence, and ensures women empowerment to reconcile the duties of a woman toward her family and her work requirements.⁹¹⁸

Recently, the Supreme Judicial Council took concrete steps to enforce the previous article. These steps can be categorized into: Firstly, a special call should be issued for women, who are currently working in the state authority and administrative prosecution bureau, and who are 30 years of age. The call will invite women to join the judiciary after a comprehensive written exam, which would be the second of its kind. The first exam was directed to female candidates who joined the judiciary in 2008.⁹¹⁹ Secondly, the Council showed its intention to include female candidates in the next call for appointees in the vacancy of aides to district attorney, the first stages in the judicial hierarchy. This intention was expressed with fear of the pragmatic constraints that would be presented in the following elements.

III. Judicial Appointment and Education Applications in a Comparative Context:

A. Judicial Appointment in Common Law Countries

In the United States, judicial appointment draws a representation of checks and balances between executive and legislative authorities.⁹²⁰ These balances allow the right to appoint federal judges after the approval of the senates, which would be discussed later in the authority of appointment. The literature of judicial appointment in the US is orientated with the argument of democratic choices of justices. The two variables in the judicial selection are popular election and the appointment of elected officials. This will be elaborated on in the judicial selection authority. Besides, judicial education and the qualification of justices take a secondary position compared to the authority of the appointment. This section will be limited to present the argument of the authority of appointment and qualifications of the justices.

⁹¹⁶EGY CONST. 2014, § 9

⁹¹⁷EGY CONST. 1923, § 3

⁹¹⁸EGY CONST. 2014, § 11

⁹¹⁹ Mariam Rizk, Egypt Interview female judges for positions in different courts, Ahram Online (29 March 2015) <http://english.ahram.org.eg/NewsContent/1/64/126401/Egypt/Politics-/Egypt-interviews-female-judges-for-positions-in-di.aspx>

⁹²⁰ Russell Wheeler, *Judicial Independence in the United States of America*, ANJA SEIBERT-FOHR (ED), JUDICIAL INDEPENDENCE IN TRANSITION, 528 (Springer 2012)

The general trend in the US legal system of judicial appointment is that there are no formal requirements to “life tenure judgeships.”⁹²¹ As for state judges, there are formal and informal requirements. While the informal requirements are restricted, the eligible requirements of state judges are more lenient compared to federal judge appointment requirements. They are limited to terms related to residency, practice, age restrictions, and the holding of a law degree.⁹²² This section will tackle the different forms of appointment on both the state and federal levels.

Unlike the authority of appointment, the US constitution did not regulate the required qualifications for federal judges. It is left to the discretion of the President to choose whoever qualifies for such a position. On the other hand, both the Congress and the Department of Justice have developed informal requirements.⁹²³ These requirements are not formally announced, in order to give more discretion and liberty to the president to process the appointments. On the state level, it is limited to a year of residency in the state, bar membership, and age limits.⁹²⁴

The authority of appointment is a complicated matted in the United States legal system, it differs from state to state, and from federal level to state level. On the state level, without going into details of the argument from both perspectives, this part of the research is limited to describe each form of appointment, whether direct appointment or by election. It is not of significance to evaluate each argument in the United States’ context; rather it is the assessment of the whole system that should be beneficial for the reform of the Egyptian system. The general debate on the state level is about either choosing or appointing judges based on election, versus by appointment. It is also debatable whether to be an independent commission or a state mayor.⁹²⁵

The proponent to the appointment system is based on four points. Firstly, the history of the United States system is based on judicial appointment.⁹²⁶ The president of the United States is competent to appoint federal judges. So it has to be maintained to state level as well. Secondly, statistics show that minorities, including women, have increased when the states adopted the appointment system.⁹²⁷ Thirdly, the federal system of appointment is still a valid system that no one condemns the way of selecting federal judges. Hence, it would be best for the state level.⁹²⁸ Finally, the appointment system ensures the balance of having “geographically, ethnically, and philosophically balanced judiciary.”⁹²⁹

On the other hand, proponents to the election system vow that it the best system, and it is better than the system of appointment. While their argument is based on many points, this part of the research will present only three main arguments in that position. Firstly, electing judges is more democratic; it gives people the chance to choose their judges. With the idea of the checks-and-balances in the US government, the election of judges gives equal balance of powers.⁹³⁰ People are then part of the direct selection of the judges, who play a major role in their daily lives.⁹³¹ Secondly, they argue that it is not true that women are equally represented in the judiciary. Women represented 1% of the total quota of the federal judiciary until the period of President Carter.⁹³² The first female justice in the US Supreme

⁹²¹*Id*

⁹²²*Id*

⁹²³ Federal Judges, United States Courts, (2014) <http://www.uscourts.gov/Common/FAQS.aspx>

⁹²⁴*Supra* 920 at 528

⁹²⁵ James Brickley and Clarice Jobs, *Judicial Appointment v Judicial Election*, 75 MICH B.J. 930 (1996), 930

⁹²⁶*Id* at 931

⁹²⁷*Id* at 931

⁹²⁸*Id* at 931

⁹²⁹*Id* at 931

⁹³⁰*Id* at 933

⁹³¹*Id* at 932

⁹³²*Id* at 932

Court was Justice O'Connor, who was associate justice in 1981.⁹³³ As for the state level, Mayors did not get used to appointing “non-traditional candidates to judicial office.”⁹³⁴ Thirdly, even if the elections would bring judges with a certain political affliction, appointed judges are always connected with a certain “partisan political” tenancies.⁹³⁵ Hence, their political affiliation does not pose a problem; it is rather a great enhancement to the political participation when people participate in judicial appointment.

There are two general forms of appointing judges. It is either through elections (Partisan/non-partisan/Uncontested retention elections) or by appointment. Twenty two states adopted the election system in choosing the judges on the state level. While candidates in seven of these states must be party affiliation, fifteen of them require nonpartisan ballots.⁹³⁶ The following table shows judicial appointment on the three levels of adjudication in each state.

Table 2:
Judicial Appointment on State Level in the United States:⁹³⁷

State	State High Court	Intermediate Appellate Courts	Trial Courts
Alabama	Elections partisan	Elections partisan	Elections partisan
Alaska	Uncontested retention elections	Uncontested retention elections	-----
Arizona	Uncontested retention elections	Uncontested retention elections	Uncontested retention elections
Arkansas	Elections non-partisan	Elections non-partisan	Elections non-partisan
California	Uncontested retention elections	Uncontested retention elections	Elections non-partisan
Colorado	Uncontested retention elections	Uncontested retention elections	Uncontested retention elections
Connecticut	Appointment	Appointment	Appointment
Delaware	Appointment	No intermediate court	Appointment
Florida	Uncontested retention elections	Uncontested retention elections	Elections non-partisan
Georgia	Elections non-partisan	Elections non-partisan	Elections non-partisan
Hawaii	Appointment	Appointment	Appointment
Idaho	Elections non-partisan	Elections non-partisan	-----
Illinois	Elections partisan	Elections partisan	Elections partisan

⁹³³ *Id* at 932

⁹³⁴ *Id* at 932

⁹³⁵ *Id* at 932

⁹³⁶ Malia Reddick and Rebecca Love Kourlis, Choosing Judges: Judicial Nominating Commissions and the Selection of Supreme Court Justices, http://iaals.du.edu/images/wygwam/documents/publications/Choosing_Judges_-_JNC_Report.pdf, see also, Judicial Selection in the States, National Center for State Courts, (2015) <http://www.judicialselection.us/>

⁹³⁷ Fact Sheet on judicial Selection Methods in the states, American Bar, http://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf

Indiana	Uncontested retention elections	Uncontested retention elections	Elections non-partisan
Iowa	Uncontested retention elections	Uncontested retention elections	Uncontested retention elections
Kansas	Uncontested retention elections	Uncontested retention elections	-----
Kentucky	Elections non-partisan	Elections non-partisan	Elections non-partisan
Louisiana	Elections partisan	Elections partisan	Elections partisan
Maine	Appointment	No intermediate court	Elections partisan
Maryland	Uncontested retention elections	Appointment	Elections non-partisan
Massachusetts	Appointment	Appointment	Appointment
Michigan	Elections non-partisan	Elections non-partisan	Elections non-partisan
Minnesota	Elections non-partisan	Elections non-partisan	Elections non-partisan
Mississippi	Elections non-partisan	Elections non-partisan	-----
Missouri	Uncontested retention elections	Uncontested retention elections	Elections non-partisan
Montana	Elections non-partisan	No intermediate court	Elections non-partisan
Nebraska	Uncontested retention elections	Uncontested retention elections	Uncontested retention elections
Nevada	Elections non-partisan	No intermediate court	Elections non-partisan
New Hampshire	Appointment	No intermediate court	Appointment
New Jersey	Appointment	Appointment	Appointment
New Mexico	Uncontested retention elections	Uncontested retention elections	Uncontested retention elections
New York	Appointment	Appointment	Elections partisan
North Carolina	Elections partisan	Elections partisan	Elections non-partisan
North Dakota	Elections non-partisan	No intermediate court	Elections non-partisan
Ohio	Elections non-partisan	Elections non-partisan	Elections non-partisan
Oklahoma	Uncontested retention elections	Uncontested retention elections	Elections non-partisan
Oregon	Elections non-partisan	Elections non-partisan	Elections non-partisan
Pennsylvania	Elections partisan	Elections partisan	Elections partisan

Rhode Island	Appointment	No intermediate court	Appointment
South Carolina	Appointment	Appointment	Appointment
South Dakota	Uncontested retention elections	No intermediate court	Elections non-partisan
Tennessee	Uncontested retention elections	Uncontested retention elections	Elections partisan
Texas	Elections partisan	Elections partisan	Elections partisan
Utah	Uncontested retention elections	Uncontested retention elections	Uncontested retention elections
Vermont	Appointment	No intermediate court	Appointment
Virginia	Appointment	Appointment	Appointment
Washington	Elections non-partisan	Elections non-partisan	Elections non-partisan
West Virginia	Elections partisan	No intermediate court	Elections partisan
Wisconsin	Elections non-partisan	Elections non-partisan	Elections non-partisan
Wyoming	Uncontested retention elections	No intermediate court	Uncontested retention elections

On the federal level, the appointment of judges is less complicated than that of the state level. Article 2 section 2 of the US constitution states:

He {President of the United States} shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.⁹³⁸

The framers did not want an absolute authority in the hand of the president to appoint federation judges. They required the president to have the Senates' approval in order to appoint judges in one of the federal courts (district court, court of appeals, or Supreme Court).⁹³⁹ On the other hand, it is clear that the framers did not see the judiciary as an authority. This is clear in the Hamilton *federalist No. 78*. As part of the checks and balances, he believes that both the executive and the legislative authorities share the power of choosing the member of the federal judiciary. He states:

The executive not only dispenses the honors, but holds the sword of the community; the legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated; the judiciary, on the contrary, has no influence over either

⁹³⁸U.S. Const. § II, § 2

⁹³⁹ David Law, *Appointing Federal Judges: The President, the Senate and the Prisoner's Dilemma*, 26 CARDOZO L. REV. 479 (2005), 482

the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.⁹⁴⁰

As for the question of how much politics takes place in the nomination of federal judges, former Senator John Tunney – member of the Senate Judiciary Committee – answers that question by saying:

The federal judicial appointment process is highly political and rarely does the United States Senate confirm a judge without experiencing an intense exposure to the reality of party politics in both the Congress and the White House. It would be nice to believe that the federal judiciary is made up of men and women who are chosen principally on the basis of their legal skills, judicial temperament and experience. Although many very talented people end up on the federal bench, the process by which they are nominated, investigated, and confirmed is driven by politics.⁹⁴¹

Moreover, judicial education is not debatable issue as the authority of appointment. The US federal justices received very minimal judicial education compared to the judicial education in civil law countries. Even though there are many endeavors to offer federal justices some legal education from private groups with different political agendas, there is a great fear of the influence of these centers over justices' decisions.⁹⁴² Besides, the Congress established in 1967 a Federal Judicial Center. This center does not offer legal education to federal judges. It aims to conduct research on the federal system, rather than develop judicial performance of the federal judiciary. Some writers argue that there is “two week orientation program and short two- or three-day continuing education programs.”⁹⁴³

As for the state justices, the situation is very different. New York is the leading state in the field of judicial education in the United States. The New York State judiciary law mandates training and establishes an independent institute for such a task. Section 219 of the NY code states “{t}here shall be established a New York State Judicial Institute. This institute shall serve as a continuing statewide center for the provision of education, training, and research facilities for all judges and justices of the unified court system.” The New York State Judicial Institute works in collaboration with the Pace Law School. It offers continuing education to judges and non-judicial officials in the justice chain in the New York state.⁹⁴⁴

In the rest of the US, many states do not have formal judicial education. Generally, states have adopted two approaches. Firstly, states require the justices to have adequate legal education without establishing specialized legal institutions. These states mandate a continuing education for their judges. In Nevada, Supreme courts mandate all judges in the state level of get a certain level of legal education; albeit specialized institutions are absent.⁹⁴⁵ In California, Standard 10.11 about the General Judicial Education Standards highlight the importance of the judicial education. It does consider judicial education as an essential process; it states that “judicial officers should consider participation in judicial education.”⁹⁴⁶ Moreover, it does not, unlike New York, mandate a certain legal institution to get such education. Secondly, some other state makes the judicial education is a voluntary process. Judges can choose to either have a certain continuing education or to get be enough legal knowledge. These states

⁹⁴⁰*Federalist No. 78, 402.*

⁹⁴¹ John Tunney, *Judicial Appointment process*, 34 PEPP L. REV. 275 (2006-2007), 275

⁹⁴²*Id* at 536

⁹⁴³*Id* 536

⁹⁴⁴ The New York State Judicial Institute, Introduction (April 9, 2014) <http://www.nycourts.gov/ip/judicialinstitute/>

⁹⁴⁵ Judicial Education Mission Statement, Judicial Education Overview, Administrative Office (February 10, 2014) <http://www.nevadajudiciary.us/index.php/judicialeducation>

⁹⁴⁶§10.11 California Rules of Court

do not require any form of juridical education, but the court administration would still offer such training, like in the state of Alabama.⁹⁴⁷

In the United Kingdom, the judicial appointment process has passed two main stages. Until 2006, judicial appointment was merely a matter of personal connections.⁹⁴⁸ There was a clear discrimination against minorities and women, who still struggle in that regard, compared to other European countries. It is worthwhile to note that the first and only female justice in the Supreme Court is Lady Hale.⁹⁴⁹ Before the judicial reform, there were several stumbling blocks against the appointment of women and minorities. Many writers considered that such reform was the most important reform in the last 100 years in the United Kingdom's history.⁹⁵⁰ However, after about 10 years of reform in the English judiciary, the main questions are still raised about the accessibility and equality in judicial appointment.

The judicial appointment system in the United Kingdom has passed through several reform stages during the past ten years, specifically since 2006. The reform started with the inception of the Judicial Appointments Commission.⁹⁵¹ The government played the main role in this commission, which would be discussed later in detail. Same as the other jurisdictions, the judiciary in the United Kingdom is based on two pillars. The first is the appointment eligibility, and the second is authority of judicial appointment. It is important to state that there are two appointment tracks, same as the German judiciary, which are the professional judges and non-professional judges. This chapter is only concerned with the professional type of judges.

There is no legal qualification requirement in order to hold an office as a judge in the United Kingdom,⁹⁵² except having the general requirement of barristers, solicitors or legal executives. Chapter 2 of the Constitutional Reform Act 2005 regulates such appointments. Section 63 states that "selection must be solely on merit ... {and} he is of good character." Some writers argue that merits mean "a reference to success in the courtroom as an advocate."⁹⁵³ However, what is the definition of merit and good character? These are very vague and ambiguous terms to be used in setting a general rule for judicial appointment.⁹⁵⁴ How many lawyers won cases in courts, and how many used unethical means to win cases? How likely is a junior barrister winning numerous cases to establish a successful career? Also, how many cases should be won to call him a winner, and how many lost to call him a loser? Without delving further into philosophical debates, it is enough to state that the only merit of Judges in the United Kingdom is being of good character.

The constitutional Reform Act 2005 regulates the general guidelines of judicial appointment. After having the general qualification as barristers, solicitors or legal executives, the only qualification required is judicial board training, which is currently called "the Judicial College." The Ministry of Justice is the entity in charge of this college, while the body in charge of training and resources is the Lord Chief Justice and Senior President of Tribunals.⁹⁵⁵

⁹⁴⁷ Judicial College, Administration Office of Courts, (2000) <http://www.alacourt.gov/Sections/JudicialCollege/default.aspx>

⁹⁴⁸ Report on Judicial Appointments and QC selection, Main Report (1999), 5, *See also Harold J. Laski, The Technique of Judicial Appointment*, 24 MICHIGAN L. REV. 529 (1929), 533.

⁹⁴⁹ Biographies of the Justices, (2015) <https://www.supremecourt.uk/about/biographies-of-the-justices.html>

⁹⁵⁰ Sally Kenney, *United Kingdom's Judicial System Undergoes Major reform*, 87 *Judicature* 79 (2004-2004),

⁹⁵¹ Sophie Turenne, *Judicial Independence in England and Wales*, ANJA SEIBERT-FOHR (ED), *JUDICIAL INDEPENDENCE IN TRANSITION*, 152 (Springer 2012)

⁹⁵² *Id at* 153.

⁹⁵³ JOHN BELL, *JUDICIARIES WITHIN EUROPE: A COMPARATIVE REVIEW* (2006), 315.

⁹⁵⁴ § 63 CONST. REFORM ACT

⁹⁵⁵ *The Judicial College (Formerly the Judicial Studies Board)*(2015) (<http://www.ejtn.eu/About/EJTN-Affiliates/Members/UK-England-and-Wales/>)

As for the statutory requirements, unlike the United States, they are based on one general rule for the appointment on the federal level. When the President names any judges, the Congress has the right to either approve or decline such candidacy. The rule in the United Kingdom is that judicial requirement is based on the level of adjudication. As for the Supreme Court, Section 25 identifies qualifications required for the Supreme Court membership. The candidate has to have at least 2 years of judicial experience or be a practitioner for 15 years.⁹⁵⁶ As for junior judges, besides having “merits” and “good character,” the Judicial Appointment Commission is the authority responsible for ensuring that such appointment is based on these two criteria. Generally, the big portion of the judges is chosen from the barristers’ category. This portion is estimated to be more than 60% of the appointment share, while the solicitor category takes about 35%, and the remaining quota from the legal executive branch.⁹⁵⁷

The authority of appointment depends on the level of the court. As for the Supreme Court, the Prime Minister is the competent authority for recommending names to the selection committee. Section 26 of the Constitutional Reform Act 2005 states that “selection of members of the court ... [requires] a recommendation may be made only by the Prime Minister.”⁹⁵⁸ Then, the selection commission “must a) determine the selection process to be applied, b) apply the selection process, and c) make a selection accordingly.”⁹⁵⁹ Besides, the commission does not have unlimited authority over the appointment. Even though the selection must be based on the candidates’ merits, it shall consult with certain entities in England, Wales, Scotland, and Ireland. These entities are Lord Chancellor, First Minister of Scotland, Assembly First secretary in Wales, Secretary of State for Northern Ireland.

The commission consists of 15 commissioners including the chairperson. Members of the commission are chosen from the judiciary, practitioners, and the public. Commissioners are chosen through “open competition with the exception of three judicial members who are selected either by the Judges’ Council or the Tribunals’ Council.”⁹⁶⁰ The Judicial Appointment commission is an independent, executive non-departmental public body under the supervision of the Ministry of Justice. Theoretically, the commission was established to eliminate any form of interference in the judicial appointment. However, the subordination of the commission to the Ministry of Justice imposes many questions. In the US, the president appoints judges, which is part of the process of checks-and-balances with the Congress that approve the appointment. While in the United Kingdom it is only the responsibility of the commission to appoint judges. The House of Lords or the House of Commons does not have any role in such appointment. While in the US the influence of the executive over the judiciary is cured with the role of the Congress, the influence of the executive in the UK is just cured with the “commission” sponsored from the Ministry of Justice.⁹⁶¹

As for judicial education, the Judicial Studies Board is the unit responsible for training judges since 1979. It was transformed in 2011 to become the Judicial College. The college aims to enhance the legal education of the members of judiciaries. The training is directed to legal ethics and practical training.⁹⁶² The college also offers legal education in the narrow sense of teaching law courses, or the development of certain legal rules. It offers seminars in all branches of the law. It is not limited to a certain type over

⁹⁵⁶ § 25 CONST. REFORM ACT

⁹⁵⁷ Judicial Appointment Commission, Official Statistics December 2014, https://jac.judiciary.gov.uk/news/jac-official-The_statistics-december-2014

⁹⁵⁸ § 26 CONST. REFORM ACT

⁹⁵⁹ § 27 CONST. REFORM ACT

⁹⁶⁰ About us, Judicial Appointment Commission, (2015) <https://jac.judiciary.gov.uk/about-us>

⁹⁶¹ Judicial Appointments Commission, Courts and Tribunal Judiciary, (2015) <https://www.judiciary.gov.uk/related-offices-and-bodies/judicial-appointments-commission/>

⁹⁶² *Supra Note 951* at 163.

another. For instance, it offers administrative law seminar, civil law seminar and criminal law seminars equally.⁹⁶³

The work of the college starts after joining the institute, like in Germany and France. It targets members of the judiciary and their professional career.⁹⁶⁴ The responsibility finds its basis in the constitutional Reform Act 2005. According to Section 2 of the Act, Lord Chief Justice and Senior President of Tribunals are obliged to offer the “members of tribunals to be experts in the subject-matter and law relevant to cases in which they decide matters and for tribunal proceedings to be handled quickly and efficiently.”⁹⁶⁵ Hence, the institute acts as a continuing education institute rather than a primary educational institute, to offer education to those who wish to join the judiciary.

B. Judicial Appointment in Civil Law Countries

In France, judicial appointment requirements are more coherent than other Common law countries. The average age of judges in France is 27, which is considered a very young age compared to judges in the US. The average age of law student in Yale, Harvard, and Berkeley law school is 24, which means they conclude their law school education at the age of 27.⁹⁶⁶ When law school graduates are about to graduate in the US, their counterparts in France at the same age are already part of the judicial hierarchy.

Currently, there are two ways to hold the position of a judge. Previously, it was limited to passing the French National School for Judiciary “ENM *Ecole Nationale d’Administration*.” The junior judges join as “Junior Judicial Officers.”⁹⁶⁷ Recently, it has added another way of judicial appointment, which is through direct appointment to the institute as “Magistrate.”⁹⁶⁸ The Minister of Justice is responsible for determining the number of appointed candidates each year under each category.⁹⁶⁹ Article 16 of the *Ordnance* No 58-1270 sets five general rules to the appointment in the judiciary. These rules are 1) holding a training diploma of at least four years of study after the baccalaureate, 2) the candidate must be of a French nationality, 3) the candidate shall enjoy civil rights and be of a good moral character, 4) be in compliance with the national service code, and finally 5) the candidate must be in a good physical fitness to carry the tasks of his/her duties.⁹⁷⁰

Additionally, Article 21/1 added two more general conditions for candidates wishing to be appointed as second or first grade in the judicial hierarchy. These terms are: 1) for the candidates for the second grade, they shall be aged thirty-five years old. They have also to have ten years of experience in the legal, economic, administrative, social or judicial fields, and 2) candidates for the first grade of the judicial hierarchy should be fifty years old. They have also to have more than fifteen years of professional experience in the same previous fields.⁹⁷¹

⁹⁶³ Judicial College, Prospectus April 2014-March 2015 Court Judiciary, <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/judicial-college/judicial-college-prospectus-2014-15-v8.pdf>

⁹⁶⁴ *Supra* Note 955

⁹⁶⁵ Strategy of the Judicial College 2015-2017 Judicial College, <https://www.judiciary.gov.uk/wp-content/uploads/2015/01/jc-strategy-2015-2017.pdf>

⁹⁶⁶ Entering Class Profile, Yale Law School <http://www.law.yale.edu/admissions/profile.htm>, See also, Entering Class Profile, University of California Berkeley Law, <http://www.law.berkeley.edu/37.htm>, Academics, State University .com, http://www.stateuniversity.com/universities/MA/Harvard_University/Harvard-Law-School.html.

⁹⁶⁷ Antoine Garapon and Harold Epineuse, Judicial Independence in France, ANJA SEIBERT-FOHR (ED), JUDICIAL INDEPENDENCE IN TRANSITION, 281 (Springer 2012)

⁹⁶⁸ *Id* at 281

⁹⁶⁹ *Id* at 281

⁹⁷⁰ § 16 of *Ordnance* No 58-1270

⁹⁷¹ § 21-1 of *Ordnance* No 58-1270

The first way of being part of the French judiciary is through the ENM. Both articles 17 and 18 of the *Ordonnance* regulate this type of appointment. This method consists of two ways. The first way is through passing an exam (Article 17), while the second is by direct appointment on a title (Article 18). Under the “exam category,” Article 17 established three types of competitive exams. The first type is for the candidate who satisfies the requirement stated in Article 16 paragraph 1. This requirement includes either 1) holding a diploma certifying that the candidate has had four years of training after his/her baccalaureate, which must be recognized by the Ministry of Justice or 2) obtaining a diploma from the institute of political studies, or obtaining a certificate of former Teaching Assistant position at the college level.⁹⁷² The second type is dedicated to officials of the state and local authorities, whether military or other state officials. They have to be in service for four years in such capacity, in order to be able to apply under this category. The third type is for candidates who have eight years in total of professional activities in an elected assembly of territorial or jurisdictional functions that are not professional.

Under the “Title Admission,” articles 18, 18-1 and 18-2 of the *Ordonnance* regulate the general rules in that regard. Article 18 states that “the declared candidates at one of the competitions ... are appointed auditors of Justice by order of the Ministry of Justice, Minister of Justice and paid a salary.”⁹⁷³ Article 18-1 sets more detailed rules in that regards. It is not limited to the terms and conditions of the appointment, but it also sets the general quota to such path of appointment. As for the general rules, they are limited to one third of the total number of auditors from the competition mentioned in Article 17.⁹⁷⁴ Previously, this quota was limited to one fifth of the number of candidates joining through the competitive exam.⁹⁷⁵ In 2007, the legislator increased this quota from one fifth to one third. The Minister of Justice is currently in charge of such appointments based on the recommendation of the judicial committee,⁹⁷⁶ which is formulated from judges and prosecutors chosen by the High Judicial Council.⁹⁷⁷

As for the conditions of appointment under this category, there are three conditions. Firstly, candidates should hold a doctorate degree in law, or they must hold another graduate degree in another subject like economics or social science. Secondly, candidates should hold a master’s degree in “law, economic or social studies:” they shall also have four years of practice before being qualified. Thirdly, candidates should hold LLM or legal studies: they have to exercise teaching or legal research at a higher educational institute for three years.⁹⁷⁸

Direct admission is the second restrictive way to join the French judiciary. There are two types of appointment under the direct admission. While the first is appointment to the second rank of the judiciary,⁹⁷⁹ the second type is direct appointment of the first rank.⁹⁸⁰ Article 22 regulates direct appointment to the second rank of the judiciary. It sets a general rule that any candidate should be older

⁹⁷² § 17 of *Ordonnance* No 58-1270

⁹⁷³ § 18 of *Ordonnance* no. 58-1270. The original text states that “*Les candidats déclarés reçus à l’un des concours prévus à l’article 17 sont nommés auditeurs de justice, par arrêté du garde des sceaux, ministre de la justice, et perçoivent un traitement.*”

⁹⁷⁴ § 18-1 of *Ordonnance* No 58-1270

⁹⁷⁵ *Supra note* 967 at 282.

⁹⁷⁶ § 18-1 of *Ordonnance* No 58-1270

⁹⁷⁷ § 34 of *Ordonnance* No 58-1270

⁹⁷⁸ § 18-1 of *Ordonnance* No 58-1270

⁹⁷⁹ § 22 of *Ordonnance* No 58-1270

⁹⁸⁰ § 23 of *Ordonnance* No 58-1270

than thirty-five years of age at the time of the appointment.⁹⁸¹ This type of appointment shall not exceed one quarter of all recruitment in a given judicial year.⁹⁸²

Besides the general qualification mentioned in Article 16, candidates must meet the following criteria: 1) candidates should have seven years of professional experience, 2) candidates work as chief judicial clerk at courts or tribunals for seven years, and 3) candidates work as officials at the Ministry of Justice for seven years, but they do not meet the condition of Article 16/1. This condition requires candidates to hold a diploma certifying their training for four years post the baccalaureate.⁹⁸³

Article 23 regulates direct appointment to the first rank of the judiciary. The difference between articles 22 and 23 lies in the following: firstly, the professional experience years, which is raised to seventeen years, and secondly, in special status to the chief clerks, who meet certain legal qualifications defined in the State Council decree.⁹⁸⁴ The quota for such type of appointment is very limited to one-tenth of the promoting judges in the given judicial year.⁹⁸⁵

Under the previous terms and conditions of appointment in France, there would be an enormous amount of applicants who meet the previous criteria. The question of the criteria of choosing candidates is addressed in Article 21 of the *Ordinance*. It states that a jury shall classify who would be deemed fit to exercise the judicial function.⁹⁸⁶ On the other hand, the article did not mention the method, terms, and conditions of choosing the jury member. It has left this for the competent minister to regulate such issue. The article is limited to the working of the jury. The director of the ENM provides the member of the jury with the necessary document regarding each applicant. The jury interviews each candidate, and later it decides his/her competence to such position.⁹⁸⁷

The main judicial education in France is the French National School for Judiciary (*Ecole Nationale de la Magistrature*). When it was first established in 1958, it was called the National Center of Judicial Studies. The school aimed to offer judicial education to both members of the judiciary and candidates who wish to join. The main mission of the school was to “provide professional training for the ‘*auditeurs de justice*’ (as the trainees are called) and to organize the life-long training of the French magistrates.”⁹⁸⁸

In Germany, there are two types of judicial appointment, which are professional and honorary.⁹⁸⁹ The honorary judges are laymen who would do judiciary services on temporary basis. They follow the same path of professional judges. This section shall be limited to discussing the provision of the professional judges. This limitation is based on two reasons. Firstly, there are no comparative uses to present this type of appointment in the Egyptian cases. Secondly, the rules of such appointment are unique to the German judiciary. It is argued in German jurisdiction that “the participation of honorary judges is seen as answering the constitutional demands for democracy and social separation of powers.”⁹⁹⁰

The qualifications required of judges in Germany are too many. Any candidate should have the general qualifications, which are the university degree, preparatory training, and successfully passing certain legal examinations. As for the general qualification, candidates shall hold a law degree from “a

⁹⁸¹ § 22 of *Ordinance* No 58-1270

⁹⁸² § 25 of *Ordinance* No 58-1270

⁹⁸³ § 22 and 16 of *Ordinance* No 58-1270

⁹⁸⁴ § 23 of *Ordinance* No 58-1270

⁹⁸⁵ § 25-1 of *Ordinance* No 58-1270

⁹⁸⁶ § 21 of *Ordinance* No 58-1270

⁹⁸⁷ § 21-1 of *Ordinance* No 58-1270

⁹⁸⁸ Ecole Nationale de la Magistrature, (2013) <http://www.enm-justice.fr/anglais/presentation/uk-historic.php>

⁹⁸⁹ Section 1 Judiciary Act 1972

⁹⁹⁰ Volker Heiz, *The appointment of Judges in Germany* (1999)

<http://www.heinzlegal.com/sites/default/files/AppointOfJudgesInGermany.pdf>

university by taking the first state examination.”⁹⁹¹ Besides, candidates shall also pass the second state examination to be “qualified to hold judicial office.”⁹⁹² Section 5 defines the difference between the two exams.⁹⁹³

As for the university degree, there are three conditions to fulfill such a requirement. Firstly, it shall be for a period of two to four years. In case the candidate finishes the law school before the required four years’ time, Article 5a states “this period may be a shorter duration in so far as the requisite attainments for admission to the university examination covering areas of specialization and to the state examination covering compulsory subjects are demonstrated.”⁹⁹⁴ Secondly, the Judicial Act also requires certain courses to fulfill the requirement of university studies. These courses are law courses in a foreign language, civil law, criminal law, public law, law of procedures, European law, and methodology of legal science and the philosophical historical and social foundations.⁹⁹⁵ Thirdly, the course work of the candidates’ studies shall cover the “practice in courts adjudication ... such as negotiation management, negotiation skills, rhetoric, conciliation, mediation, questioning techniques and communication skills. During the period where lectures are not held time shall be spent on practical studies for a total of not less than three months.”⁹⁹⁶

The German Judicial Act mandates a preparatory training for a period that “shall last for two years.”⁹⁹⁷ Candidates shall have the preparatory training in certain agencies. The Act differentiates between mandatory agencies and four optional agencies. While it specifies the mandatory agencies, it leaves the optional agencies to the discretionary authority of the “faculty of law and the German Academy of Administrative Science in Speyer.”⁹⁹⁸ As for the mandatory agencies, they are limited to four agencies. They are the court of ordinary jurisdiction in civil matters, the public prosecutor’s office, a court with jurisdiction in criminal matters, and administrative authority or with counsel.⁹⁹⁹ The training period is three months in case of training in one of the compulsory agencies except “compulsory training with counsel.”¹⁰⁰⁰ In that case, it shall be at least for nine months.¹⁰⁰¹

As for the examination, there are two examinations that any candidate shall pass in order to hold the office of junior judge. The first state examination shall be in subjects related to the practice in the court of adjudication.¹⁰⁰² The examination shall include at least one written examination. Besides, it shall comprise both written assignments and oral examinations.¹⁰⁰³ This examination takes place before the end of the two-and-a-half years of study.¹⁰⁰⁴ As for the second state examination, it is related to candidate training, and it shall be taken in “the eighteenth month of training at the earliest and the in the twenty-first month of training at the latest.”¹⁰⁰⁵ It shall also include an oral examination related to the whole training period, after the candidate finishes his/her training period.¹⁰⁰⁶

⁹⁹¹ §5 Judiciary Act 1972

⁹⁹² §5 Judiciary Act 1972

⁹⁹³ §5 Judiciary Act 1972. It states “the first state examination comprises a university examination covering areas of specialization and a state examination covering compulsory subjects

⁹⁹⁴ §5-a Judiciary Act 1972

⁹⁹⁵ §5-a Judiciary Act 1972

⁹⁹⁶ §5-a Judiciary Act 1972

⁹⁹⁷ §5-b-1 Judiciary Act 1972

⁹⁹⁸ §5-b-2 and 3 Judiciary Act 1972

⁹⁹⁹ §5-b-2 Judiciary Act 1972

¹⁰⁰⁰ §5-b-4 Judiciary Act 1972

¹⁰⁰¹ §5-b-4 Judiciary Act 1972

¹⁰⁰² §5-d-1 Judiciary Act 1972

¹⁰⁰³ §5-d-2 Judiciary Act 1972

¹⁰⁰⁴ §5-d-2 Judiciary Act 1972

¹⁰⁰⁵ §5-d-3 Judiciary Act 1972

¹⁰⁰⁶ §5-d-3 Judiciary Act 1972

A special issue in the appointment of the judiciary in Germany is the appointment through professorship. In the US, there is no clear rule that requires or devotes a special path to law professors to join the bench. However, full time professors can hold judicial office in the US. There are no rules to prevent law professors from holding judicial office. Five out of nine justices of the US Supreme Court were former law professors before joining the law school.¹⁰⁰⁷ In Germany, it is part of the legislation in Germany that law professors can join the judiciary.¹⁰⁰⁸ Currently, there is a considerable number of law professors working part-time as judges in Germany.¹⁰⁰⁹

The judicial Act also regulates the forms of holding office for tenure positions. As a rule, judges in Germany, same as in France, cannot be removed from office except in two cases. They either reach the retirement age, or they get impeached. One of the exceptions of this rule is a judge of the Supreme Court. They have a fixed term of 12 years, during which they cannot be removed unless they are impeached for misuse of authority. As for the legal forms of judicial services, there are five types. They are appointment for life,¹⁰¹⁰ appointment for specified term,¹⁰¹¹ appointment on probation,¹⁰¹² appointment by commission,¹⁰¹³ and appointment by deed.¹⁰¹⁴ Finally, unlike the US system, the seniority of a certain judge is determined by the date “upon which a judicial office was conferred upon him/(her).”¹⁰¹⁵

The hypothesis is that there are always more candidates qualified to hold office than the offered positions. Hence, the question is: who should be responsible for choosing the best candidates? The previous section is limited to the general qualification that each judge has to enjoy holding a judicial office. The rules of the authority of appointment were not regulated in the Judicial Act. However, the Minister of Justice on the federal level enjoys a great authority. Same as in the US, the rules are different based on state and federal levels. The state level is left to each state to regulate its own rules related to the person/commission authority to appoint judges in each State/Lander.

Electoral committees play a great role in the selections process in eight Lander/States. They are committees formed by the parliamentary vote or nomination of legal professionals. They also include the Minister of Justice and practitioners.¹⁰¹⁶ Article 98/4 of the Basic Law states that “the Lander may provide that land judges shall be chosen jointly by the land’s Minister of the Justice and a committee for the selection of judges.” On the state level, there is no formal method of choosing candidates in Germany. Each state has its own method of choosing its judges. The following table shows the choice of candidates in each State/Lander.

¹⁰⁰⁷ Biographies of Current Justices of the Supreme Court, Supreme Court of the United States (March 09.2011)

<http://www.supremecourt.gov/about/biographies.aspx> Justice/ Elena Kagan was a professor at the University of Chicago and Harvard law Schools. Justice/ Antonin Scalia, who passed away in 2016, was a professor of law at the Universities of Virginia, Chicago, Georgetown, and Stanford. Justice/Anthony Kennedy was a professor at McGeorge School of Law and the University of the Pacific. Justice/ Ruth Bader Ginsburg was a professor of law at Rutgers University’s School of Law and Columbia Law School. Stephen Breyer was a professor at Harvard Law School

¹⁰⁰⁸ §7 Judiciary Act 1972, it states “every full professor of law at a university within the area of application of this Act shall be qualified to hold judicial office.”

¹⁰⁰⁹ *Supra note 990 at 466.*

¹⁰¹⁰ §10 Judiciary Act 1972

¹⁰¹¹ §11 Judiciary Act 1972

¹⁰¹² §12 and 13 Judiciary Act 1972

¹⁰¹³ §14, 15, 16, Judiciary Act 1972

¹⁰¹⁴ §17 Judiciary Act 1972

¹⁰¹⁵ §20 Judiciary Act 1972

¹⁰¹⁶ Fiona O’ Connell and Ray McCaffrey, *Judicial Appointments in Germany and the United States*, (March 2012), 15 <http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2012/justice/6012.pdf>, *see also*, J Reidel, *Recruitment, professional Evaluation and Career of Judges and Prosecutors in Germany*, Recruitment, <http://www.difederico-justizia.it/wp-content/uploads/2010/09/recruitment-evaluation-and-career.pdf>

Table (3)

Authority of Appointment in Germany Both the Federal and State Level: ¹⁰¹⁷

State/Lander	Choice of Candidates
Federal Level	<p>Each member has the right to recommend candidate/s to the committee to choose among them</p> <p>Council for judicial appointment (It has an advisory opinion about the appointment of judges Section 54 and 55 of Judicial Act)</p> <p>Electoral Committee (16 members from the Parliament, 16 Lander (States) Ministers of and Federal Minister of Justice with no voting power)</p>
State Level	-----
Baden Württemberg	<p>Candidate Documents + Interview with the Head of the Personnel Department of the Ministry</p> <p>Electoral Committee (6 members from the Parliament, 8 judges, 1 lawyer, and the Minister of Justice with no voting power)</p>
Bayern	<p>Candidate Documents + Interview with the head of the Personnel Department of the Court</p>
Berlin	<p>Candidate Documents + Interview with the president of the regional higher court and the court's head of personnel department + Approval of the Judicial Electoral Committee</p> <p>Electoral Committee (6 members from the Parliament, 5 judges, 1 lawyer, and the Minister of Justice)</p>
Brandenburg	<p>Candidate Documents + Interview with the president of the regional higher court and the court's head of personnel department + Approval of the Judicial Electoral Committee</p> <p>Electoral Committee (6 members from the Parliament, 3 judges, 1 lawyer, and the Minister of Justice with no voting power)</p>
Bremen	<p>Candidate Documents + Interview with Minister of Justice + Approval of the Judicial Electoral Committee</p> <p>Electoral Committee (5 members from the Parliament, Minister of Justice, 2 other ministers, 3 judges, and Minister of competent for the court concern)</p>
Hamburg	<p>Candidate Documents + Interview with Minister of Justice + Approval of the Judicial Electoral Committee</p> <p>Electoral Committee (6 members from the Parliament, Minister of Justice, 2 other ministers, 3 judges, 2 lawyers, and the Minister appointed from the Parliament)</p>

¹⁰¹⁷ *Id*

Hessen	Candidate Documents + Interview with Minister of Justice + Approval of the Judicial Electoral Committee Electoral Committee (7 members from the Parliament, 5 judges, 1 lawyer (President of the Bar), and the Minister of Justice with no voting power)
Mecklenburg-Vorpommern	Candidate Documents + Examination Results
Niedersachsen	Candidate Documents + Examination Results + Interview in the Ministry of Justice
Nordrhein - Westfalen	Varied by the differ courts Dusseldorf: Interview+ Role play + Group Discussion Cologne: Speech + Working Test + Interview Hamm: Working a full working day+ Group Discussions + Interview by a committee
Rheinland- Pfalz	Candidate Documents + Examination Results + Interview with (Secretary of State in the Ministry of Justice, head of the personnel department of the Ministry of Justice and Representatives of the Staff Council)
Sachsen	Candidate Documents + Examination Results + Interview in the Ministry of Justice
Sachsen- Anhalt	Candidate Documents + Examination Results
Schleswig-Holstein	Candidate Documents + Examination Results + Interview with the Electoral Committee Electoral Committee (8 members from the Parliament, 3 judges, 1 lawyer, and the Minister of Justice with no voting power)
Thüringen	Candidate Documents + Examination Results + Interview Electoral Committee (8 members from the Parliament, 3 judges, 1 lawyer (president of the Bar), and the Minister of Justice with no voting power)

The judicial education is not focused on certain practical training to members of the judiciary. The German judges follow the general rules of education and training that apply to all members of the profession like lawyers and prosecutors. They all have to pass the first and the second examinations.¹⁰¹⁸ The Judicial Academy plays a vital role in further training the judges after joining the bench. Unlike France, the Academy does not play any role to train the candidate before joining the bench.¹⁰¹⁹

IV. Proposed Reform of the Egyptian Judiciary

¹⁰¹⁸ Anja Seibert- Fohr, Judicial Independence in Germany, ANJA SEIBERT-FOHR (ED), JUDICIAL INDEPENDENCE IN TRANSITION, 464 (Springer 2012)

¹⁰¹⁹ *Deutsche Richter Akademie*, Tasks, (2015) http://www.deutsche-richterakademie.de/icc/draen/nav/42b/42b060c6-20f5-0318-e457-6456350fd4c2&class=net.icteam.cms.utils.search.AttributeManager&class_uBasAttrDef=a001aaaa-aaaa-aaaa-eeee-000000000054.htm

As for judicial education requirement, there are three new judicial requirements that will be added to the current appointment requirements. Firstly, education standards should be improved. Sufficing with minimum education requirements opens the door for mediocre candidates, especially with the increasing number of law graduates in Egypt. Including higher educational stander can improve the appointment requirements. This can be done through adding an educational requirement of a postgraduate degree, such as a Master's degree, or a legal diploma.

Secondly, judicial practical training should be a mandate for judicial appointment. It is uncommon that law students intern with district attorneys, or district judges. Conversely, this system is adopted aggressively in the United States and Germany. The application of this system would achieve three merits. Firstly, it will allow law students a deeper perspective into intricacies of the court system. Secondly, law interns will contribute to judges' effort in research, data collection, editing, and writing. Thirdly, interns will not pose an additional cost to the judiciary, since they will learn in exchange for their services. Finally, at the end of the internships, interns are given assessment reports that can later be used as additional reference during appointment process. These reports will act as a measurement of commitment to the interns' job tasks.

Thirdly, the executive authority shall no longer interfere in the judicial appointment process. Banning political reports will end the authority's influence over the nomination process. It argued that banning candidates with political affiliation is based on JAL that ban political opinions of judges and courts. However, such ban is only applicable after the appointment, not before. Besides, ending the executive authority's interfere in the judicial appointment process is more important than the political affiliation of any of its members. The political affiliation of the member can be legal cured through impeachment process, while the executive intervention cannot be later cured,

As for judicial authority issue, SJC – currently- is the competent authority of appointing judges and prosecutors. It is not democratically formulated as indicated earlier, either internally or externally. The appointment authority shall be separated from the SJC. After the restructuring of the SJC, it will have many administrative responsibilities. The process shall be assigned to an independent body that includes judges, lawyers, law professors, and representatives from the public. The role of this body will be to separate the authority of impeachment, from that of appointment. The new authority of appointment will ensure the diversity and representation of all social without discrimination. As shown previously, there has been a long history of discrimination against women and the under-privileged. Discrimination is unlawful and prohibited. However, the judiciary, depicted as being above the accountability rule, has protected such discrimination for decades.

V. Conclusion

The judiciary faces many challenges in their appointment process. Primitive methods are still adopted, which are no longer in practice in modern judiciaries. A new system shall be formulated to work out the challenges, and enhance the development in judicial appointment. For the various requirements, there shall be two steps towards improvement. One is mandating postgraduate studies (like Germany), and the other is introducing specialized judicial education (like France). They should go hand in hand, not in isolation of one another. The improved level of education requirements will increase the level of competition and collaboration among candidates. As for the appointment process, there must be transparency, justice and equality to the public, to ensure the elimination of discrimination against women and the poor.

Conclusion and Recommendations

The adoption of the current 2014 constitution mandates a new judicial authority law. This law shall not reflect the personal interest of the judiciary as insulated elites members of the society. It shall address the public concern. This would increase both credibility and reliability of the institute to face the current challenges in the society. This recommendation can be summarized in the following points.

1- Judicial Independence:

- a. Judiciary has to adopt clear rules of political participation and sanctions for violations. It is unacceptable that rules of banning the political participation apply only on the opponents of the political regime. It has to apply it equally, and it is not a tool of retribution from the political rivals.
- b. Judiciary has to be excluded from electoral process to play its main role of protecting the legality of the process, instead of protecting the process itself.
- c. Judiciary has to accept the political responsibility of their acts. It is unacceptable for an independent judiciary to be above the political participation.
- d. A new formulation of the Supreme Judicial Council has to be introduced to reflect democratic and accountable judiciary to the public, who are the source of their authority

2- Judicial Accountability:

- a. Judiciary has to adopt clear rules of transparency. The inabilities of adopting such rules will continue to impose a question about the ability of the judiciary to face corruption (both internal and external).
- b. The rule of transparency that shall be adopted includes but not limited to; announced details budget (expenditures and revenues) to the public, announce courts statistics (cases, types and judges assignment), declare the disciplinary procedures against judges,
- c. The attorney general has to address the people regarding cases to insure to the public. It is not acceptable that the attorney general keep banning the publication in corruption and police misconduct

3- Judicial Appointment:

- a. Illumination of all discriminatory requirements in the appointment process, like social class, political affliction and gender. It is no long accepted that the law does not recognize any form of discrimination among the people, while the judiciary application to the rules clarify the existence of such discrimination.
- b. Raise the stander of appointment to include extra educational and post-appointment training (internships). As an interim period, the extra education can include requiring a postgraduate degree.
- c. Judicial appointment committees of the four judicial institutes (ordinary, state council, administrative prosecution and state case authority) shall be unified. This will help to avoid the double standard requirements, and double offered for single candidates.
- d. Include new members in the appointment committee to reflect also the democratic process of appointment and the legitimacy of its members. As an interim period, the new members can be senior professors, who – as mentioned earlier- enjoy a great respect among the judicial community.

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